Supreme Court, U.S.
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No. 03-935

In The Supreme Court of the United States

STATE OF NORTH DAKOTA AND
STATE OF SOUTH DAKOTA,

Petitioners,

v.

LT. COL. K.F. UBBELOHDE, DIST. ENGINEER, OMAHA DIST., U.S. ARMY CORPS OF ENGINEERS; BRIG. GEN. W.T. GRISOLI, COMMANDER, NW DIV., PORTLAND, OR., U.S. ARMY CORPS OF ENGINEERS; STATE OF MISSOURI; AND THE STATE OF NEBRASKA; ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This case concerns competing uses of the Missouri River. Uses to which this 2,300-mile river is put include commercial navigation, a myriad of recreational uses, irrigation, municipal drinking water, and nuclear and hydro power generation. There has been a long-standing and divisive dispute between upper and lower basin states over how to properly manage the flow of Missouri River water. In essence, upstream states want water retained in upstream reservoirs to support the recreation industry, while downstream states want water released to support navigation. Recreation in the upper basin is vibrant. Its economic value is many times greater than navigation, which is a declining industry. The United States Corps of Engineers manages the Missouri River under the 1944 Flood Control Act. The Act requires that the Corps equitably balance the uses to which the river is put. The Corps itself has stated that it is obligated to equitably balance uses. The court below, however, ruled that the Act requires that the Corps must generally favor stagnant downstream navigation over thriving upstream recreation. The question presented is:

Whether the 1944 Flood Control Act allows the Corps of Engineers to consistently allocate the water from the Missouri River's upper basin reservoirs to serve downstream navigation at the expense of upstream fish, wildlife and recreation?

RULE 14(1)(b) STATEMENT – LIST OF PARTIES

The following are parties to the proceeding below:

The State of Missouri
The State of Nebraska
The State of North Dakota
The State of South Dakota
The U.S. Corps of Engineers
The MO-ARK Association, a Kansas Non-Profit Association
Ergon Asphalt & Emulsions, Inc.
Magnolia Marine Transport Co.
Blaske Marine, Inc.
Koch Materials Co.
Mid-West Terminal Warehouse Co., Inc.
Tosco, a subsidiary of Phillips 66 Co.
Jebro, Inc.
Memco Barge Line, Inc.

While the following were not parties to the proceeding below, they are parties to ongoing litigation involving the Missouri River's proper management:

Montana Department of Fish, Wildlife & Parks
South Dakota Department of Game, Fish, & Parks
North Dakota Department of Game & Fish
American Rivers
Environmental Defense
National Wildlife Federation
Iowa Wildlife Federation
Kansas Wildlife Federation
Montana Wildlife Federation
Nebraska Wildlife Federation
North Dakota Wildlife Federation
South Dakota Wildlife Federation
Izaak Walton League of America

RULE 14(1)(b) STATEMENT – LIST OF PARTIES – Continued

Mandan, Hidatsa, & Arikara Nation
Missouri River Energy Services, Inc.
Nebraska Public Power Dist.
Coalition to Protect the Missouri River, a Missouri Non-Profit Corporation
ConocoPhillips Co.
Midwest Area River Coalition 2000, a Missouri Non-Profit Association
Missouri River Keepers, an Iowa Non-Profit Corporation
U.S. Department of Interior
U.S. Fish & Wildlife Service

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PETITION FOR A WRIT OF CERTIORARI

The petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at 330 F.3d 1014. App. at 1. The opinion was issued in a consolidated case that reviewed preliminary injunctions issued by three district courts. These injunctions are unreported. App. at 49, 69, 75. The court's order denying North Dakota's petition for rehearing with suggestion for rehearing en banc is unreported. App. at 82. This order also denied the United States Corps of Engineers' petition for rehearing en banc.

JURISDICTION

The judgment of the court of appeals was entered on June 4, 2003. North Dakota's and the Corps of Engineers' petitions for rehearing were denied on September 30, 2003. App. 82. The jurisdiction of this Court is invoked under 25 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the 1944 Flood Control Act, Pub. L. No. 78-534, 58 Stat. 887 (1944), are in the Appendix at 83.

STATEMENT

A. Introduction

"A river . . . offers a necessity of life that must be rationed among those who have power over it." *New Jersey v. New York*, 283 U.S. 336, 342 (1931) (Holmes, J.). This case is about the fair division of Missouri River waters among the seven states through which it flows. It is about whether those states – Montana, North Dakota, and South Dakota – that sacrificed the most to protect the entire basin from floods are to be allowed an appropriate measure of benefit from federal dams and reservoirs – facilities that flooded towns, farms, ranches, and hundreds of thousands of acres of some of the most valuable land in these states.

North and South Dakota were promised, in return for the presence of huge reservoirs within their borders, large irrigation projects. These promises remain unfulfilled. Thus, this case is about whether the benefit these states have themselves largely built, a lake-based recreation industry, will be allowed to develop, or whether the lavish water needs of the small, marginally economic downstream navigation industry, an industry that provides less than 1% of the economic benefits produced by the river, gets priority.

B. Statutory Background

Damaging floods in 1942 and 1943 spurred Congress to consider managing the unruly Missouri River. In 1944 the Corps of Engineers filed with Congress its plan to control the river and develop the basin. H.R. Doc. No. 475, 78th Cong., 2nd Sess. (1944). The primary author was Col. Lewis Pick and so the Corps' plan became known as the

"Pick Plan." A few months later, the Bureau of Reclamation presented Congress with its plan. S. Doc. 191, 78th Cong., 2nd Sess. (1944). The primary author was a Bureau employee, William Sloan. The Bureau's proposal became known as the "Sloan Plan."

The two plans differed. The Pick Plan recommended construction of extensive downstream levees; some tributary dams; and five large dams on the river's main stem. H.R. Doc. No. 475, *supra* at 26-28. The Corps described its proposed reservoirs as "multiple-purpose" facilities, *id.*, and its proposal as "comprehensive," one that would "provide for the most efficient utilization of the waters of the Missouri River Basin for all purposes, including irrigation, navigation, power, domestic and sanitary purposes, wildlife, and recreation." *Id.* at 29. The Bureau of Reclamation's Sloan Plan proposed dozens of smaller dams in the headwaters and on tributaries, and three large dams on the main stem. S. Doc. 191, *supra* at 52-53, 66-67, 78, 95, 118. The Sloan Plan, like the Pick Plan, recommended projects for the comprehensive, multiple use of Missouri River waters, and proposed numerous uses, including "recreation" and "fish and wildlife preservation." *Id.* at 17-18.

Congress thus had before it two different plans from two powerful federal agencies. But fearing that the Missouri's development might be given to a new, independent entity, the Corps and Bureau reconciled their differences, setting forth their agreement in a Joint Report. App. at 93. Their agreement did not sacrifice the objectives of their individual plans. The two agencies "essentially agreed to build all the projects they had proposed." Craig A. Street, *Addressing Missouri's Domestic Conflict of Interests in the Missouri River: A Suggested Approach for Resolution*, 5

Mo. Envtl. L & Pol'y Rev. 117, 126 (1998). Congress accepted the proposed consolidation stating that the "general comprehensive plans" in the two proposals, "as revised and coordinated by" the Joint Report, "are hereby approved." App. at 90.

As stated, the two plans each set forth varied purposes for which the dams would be operated. Included within each articulation of project purposes was wildlife and recreation. *E.g.*, H.R. Doc. 475, *supra* at 29; S. Doc. 191, *supra*, at 13, 17. The Joint Report combined the objectives of both plans and so wildlife and recreation are necessarily included. Indeed, the Joint Report states that the basin's development is to secure benefits for "flood control, irrigation, navigation, power, domestic and sanitary purposes, wildlife, and recreation." App. at 102. The Joint Report and Congress, through its adoption of the Report, did not set priorities among these uses, with one exception. The O'Mahoney-Milliken Amendment provided that upstream consumptive uses, such as appropriations for irrigation and drinking water, have priority over navigation. App. at 85. The Flood Control Act's preamble also instructs that navigation works are to be limited to those that provide "a substantial benefit" and that are "operated consistently with appropriate and economic use of the waters . . . by other users." *Id.* at 83. Other than this priority for upstream consumptive uses over navigation, and the preamble's other limit on navigation, the uses were not ranked or given priorities.

C. Factual Background

After enactment of the 1944 Flood Control Act, five dams were built on the main stem of the Missouri River,

four in South Dakota and one in North Dakota. Montana's Ft. Peck Dam, which had been built earlier under a different statute and primarily to aid navigation, Act of Aug. 30, 1935, ch. 831, 49 Stat. 1028, 1034 (1935), was converted to a multiple-purpose dam. App. at 97.

North Dakota's Lake Sakakawea was formed by construction of Garrison Dam. The lake extends 178 miles, covers 368,000 acres at its normal operating level, and has 1,300 miles of shoreline. *North Dakota v. United States Corps of Engineers,* 264 F.Supp.2d 871, 875 (D.N.D. 2003). Lake Sakakawea holds 32% of the total storage capacity in the Missouri River system. *Id.* South Dakota's Lake Oahe extends 231 miles and has 2,250 miles of shoreline. U.S. Army Corps of Engineers, *Missouri River Revised Draft Environmental Impact Statement Vol. 1: Main Report* 3-134 (Aug. 2001) (hereafter "Revised DEIS"). Oahe provides 31% of the system's storage capacity. *North Dakota v. United States Corps of Engineers,* 270 F.Supp.2d 1115, 1129 (D.N.D. 2003).

Construction of the main stem dams came at a price, and not just a fiscal one. "The reservoirs were built at great cost to the upper Missouri basin states and their inhabitants." Robert E. Beck, *A Book Review of River of Promise, River of Peril: The Politics of Managing the Missouri River,* 1 Great Plains Nat. Resources J. 477, 479 (1996). South Dakota "gave up over 530,000 acres of the most productive and valuable farm land in the state to build the dams and flood the land, all of which was and is designed to protect downstream communities from flooding." App. at 59. North Dakota gave up a similar amount of land. Flooding this land upset "[t]he ecological balance of the entire region, and that of the Dakotas in particular." Michael L. Lawson, *Dammed Indians: The Pick-Sloan*

Plan and the Missouri River Sioux, 1944-1980 194 (1982). "The inundation of precious forests and bottomlands not only eliminated the natural wildlife habitat but also created serious erosion problems." *Id.* Lake Sakakawea cut-banks are eroding at rates as high as 19 feet a year and on Lake Oahe as high as 23 feet a year. *Revised DEIS* at 3-22. Tribal governments describe the erosion as "'extensive.'" *Id.* Thus, the loss of agricultural land in the upper basin continues and unstable banks have led to the loss of sacred and cultural sites. *See, e.g., Yankton Sioux Tribe v. U.S. Army Corps of Engineers*, 194 F.Supp.2d 977, 983 (D.S.D. 2002).

The downstream states have been well served by the Act's flood control benefits, but the attempt to sustain a viable navigation industry downstream has failed. According to two scholars, despite the fact that the government built an "expensive" nine-foot channel in the lower basin and continually maintains it, navigation, which requires "lavish amounts of water, [has] not developed into an enterprise of noticeable size or need." John H. Davidson & Thomas Earl Geu, *The Missouri River and Adaptive Management: Protecting Ecological Function and Legal Process*, 80 Neb. L. Rev. 816, 836 (2001). The industry is presently worth only $7 million annually, *e.g., American Rivers v. United States Army Corps of Engineers*, 271 F.Supp.2d 230, 261 (D.D.C. 2003); App. at 59; *Revised DEIS at 5-125*, and maybe as little as $1 million. *North Dakota,* 270 F.Supp.2d at 1129. Navigation delivers less than 1% of the overall economic benefits produced by the river. *Revised DEIS* at 5-131. As the South Dakota District Court found, downstream navigation has been declining for some time, "will continue to decline greatly, and is of little, if any, net economic value on the Missouri River."

App. at 59. Navigation tonnage peaked in 1977 at 3.3 million tons. *Revised DIES* at 3-145. By 1990 and 2000 the volume had slipped to 1.3 million tons. *Id.* at 3-146. Grain shipments fell 81% from the peak of 1.95 million tons in 1964 to just 0.37 tons in 2000. C. Philip Baumel & Jerry Van Der Kamp, *Past and Future Grain Traffic on the Missouri River* 1 (Inst. for Ag. & Trade Policy, July 2003). The small volume of Missouri River commerce is apparent when compared to other rivers. Mississippi barges carry over 380 million tons per year and the Ohio River moves at least 150 million tons. Brian Morris, *Unanswered Prayers: The Upper Missouri River Basin States Take on the U.S. Army Corps of Engineers*, 68 N.D. L. Rev. 897, 915 (1992). Unsurprisingly, commentators describe downstream navigation as "moribund," "an experiment that has failed," and "the army's bad joke." *Id.* at 935; Davidson & Geu, *supra*, at 836; Lawson, *supra*, at 187. A district court below described it as "rather meager." App. at 59.

For their sacrifices, the upper basin states were to receive massive irrigation projects. *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 508 (1988). This promise has remained unfulfilled. While most of the water in South Dakota's Lake Oahe was projected to be used for irrigation, "none of this water has been allotted for irrigation, no works have been constructed to make use of this water for irrigation, and none of this water has ever been used for irrigation or is likely to be used for that purpose in the foreseeable future." *Id.* at 509 n.5. *See also* App. at 60 (the promised irrigation of South Dakota's James River Valley, "an idea that primarily drove the Pick-Sloan Plan, never materialized"). Indeed, "South Dakota has received rather little from the dams and has given up much." App. at 60.

The story of unfulfilled irrigation promises is the same in North Dakota. *E.g.*, Street, *supra*, at 127.

> North Dakota sacrificed hundreds of thousands of acres, much of it prime river bottomland, for the greater benefit of the nation. In return, the Federal Government promised assistance in replacement of the economic base of the State and Indian Tribes. There is evidence that this has not taken place.

Garrison Diversion Unit Comm'n, *Final Report* i (Dec. 20, 1984). Without question, "the upper basin states and . . . tribes have been short-changed in the management of the Missouri River and something should be done about it." Beck, *supra*, at 490.

Of all the benefits Pick-Sloan promised, the "most immediate and successful" have been upstream recreation and tourism. Lawson, *supra*, at 188. Vacationers come to the upstream reservoirs to swim, boat, camp, and picnic. *Id; Revised DEIS* at 3-127. The primary attraction of the reservoirs, however, is fishing. The reservoirs are fishing destinations for tens of thousands of local and out-of-state fishermen in search of trophy walleye. The upstream reservoirs are national and world class sport fisheries. *North Dakota,* 270 F.Supp.2d at 1129, 1130. South Dakota's Lake Oahe may be "the greatest [w]alleye fishery in the United States." App. at 50. Anglers in turn support local hotels, bait and boat shops, marinas, and businesses near and on the road to the reservoirs. "Businesses catering to tourists and outdoor enthusiasts have thrived." Lawson, *supra*, at 188.

The economic value provided by Missouri River recreation is exceptional, even though it has not attained

its full potential. South Dakota's Missouri River fishing industry is worth $51 million a year. App. at 50; *North Dakota*, 270 F.Supp.2d at 1130. Lake Oahe fishing alone produces revenues of about $20 million a year. App. at 38. North Dakota has calculated the benefits of its fishing and tourism industry at about $65 million a year, with the value of the Lake Sakakawea fishery alone being at least $23 million a year. *North Dakota v. Corps,* 270 F.Supp.2d at 1129. In sum, the competition for Missouri River water is between the lower basin's stagnant, localized navigation industry and the upper basin's "growing recreation industry." Morris, *supra,* at 898.

The allure of trophy walleye drives upstream recreation. But the walleye cannot survive without its primary food source, the rainbow smelt. The smelt spawn occurs each spring when the smelt lay their eggs within about six inches of the surface. App. at 40. If the water recedes the eggs will die after a few minutes of exposure to the air. *Id.* Thus, a successful smelt spawn requires a stable or rising water level. *Id.* The Corps in 2002, as it had many times before, threatened to sacrifice upstream fisheries by destroying the smelt to satisfy the demands of the dwindling navigation industry. This threat triggered the litigation now before this Court.

D. District Court Decisions

South Dakota biologists were anticipating an excellent smelt spawn in the spring of 2002. This was after several years in which the smelt population had been "greatly reduced . . . thus starving the walleye population." App. at 49. The reduced smelt population was caused in part by the Corps' "great flushes of water," which forced the smelt

through the Oahe Dam's turbines. *Id.* To protect the spawn, South Dakota needed a few weeks of stable water. The Corps, however, wanted to release more water from South Dakota reservoirs than was flowing in. The effect of the loss of the smelt spawn on the walleye would have been devastating to South Dakota and the businesses and communities that depend on the fisheries. *Id.* at 42-43, 54. "Destruction of the fisheries would deprive South Dakota of the remaining benefit from having over a half million of its acres flooded and forever lost." *Id.* at 60.

To protect its smelt spawn, South Dakota obtained a restraining order and later a preliminary injunction prohibiting the Corps from drawing down two reservoirs. *Id.* at 35. Because the injunction was designed to protect only the spring smelt spawn, it was set to expire on May 25, 2002. *Id.* at 62-63. In response to the South Dakota injunction, the Corps announced plans to immediately draw down North Dakota's Lake Sakakawea and Montana's Ft. Peck Reservoir. This stirred these two states to obtain injunctions to protect their fisheries. *Id.* at 64, 69, 72. Because the purpose of these injunctions was to protect the 2002 smelt spawn, they too were of short duration. North Dakota's was to expire on May 25th and Montana's on the 23rd. *Id.* at 71, 73-74.

Nebraska, after being denied intervention in South Dakota's suit, filed an action in the District of Nebraska, into which Missouri intervened. The Nebraska District Court injunction ordered the Corps to comply with its *Missouri River Master Manual*. *Id.* at 75. The *Master*

Manual guides the Corps' river management.[1] Faced with these injunctions, the Corps appealed. The Eighth Circuit promptly stayed the North Dakota, South Dakota, and Nebraska injunctions. (The Court of Appeals did not address the Montana order. Montana is in the Ninth Circuit).

E. Other Missouri River Litigation

While the Corps' appeal was pending, there was no activity in the underlying actions, though Montana voluntarily dismissed its suit in June of 2002. But with the drought continuing into its fourth year, three new suits were filed in 2003. Private downstream interests sued the Corps, the U.S. Fish & Wildlife Service, and the Montana, North Dakota, and South Dakota game and fish departments. First Amended Complaint, *Blaske Marine, Inc., et al. v. Norton, et al.*, No. 8:03CV142 (D. Neb. Apr. 14, 2003). The plaintiffs assert, in part, that walleye stocking programs in the upper basin adversely affect the Missouri River's pallid sturgeon, an endangered species. They also challenge agency decisions made under the Endangered Species Act ("ESA"), NEPA, the 1944 Flood Control Act, and other federal laws.

Also in the spring of 2003, North Dakota again sued the Corps, but on a theory different than its 2002 suit. The state contends that the ongoing draw down of Lake Sakakawea is removing so much water that the lake's cold

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[1] The *Master Manual*, which is supplemented with an Annual Operating Plan, was last revised in 1979. In 1989 the Corps recognized the *Manual* as out-of-date and in need of revision. Since 1989 it has been working on issuing a new *Manual*. App. at 6.

water habitat is in jeopardy. Complaint, *North Dakota, et al. v. United States Corps of Engineers, et al.*, No. A1-03-050 (D.N.D. Apr. 29, 2003). The Corps' actions, North Dakota contends, violate water quality standards North Dakota adopted for Lake Sakakawea under the federal Clean Water Act, and that these violations will lead to the loss of the lake's cold water habitat, endangering the health of the walleye and salmon.

Environmental groups also filed suit in 2003. First Amended & Supp. Complaint, *American Rivers, et al. v. United States Corps of Engineers, et al.*, No. 1:03CV00241 (D.D.C. May 8, 2003). This suit asserts that the Corps and Fish & Wildlife Service violated the ESA by failing to protect two Missouri River shore birds, the threatened piping plover and the endangered least tern, as well as the river's endangered pallid sturgeon. In 2000 the Fish & Wildlife Service had issued a biological opinion under the ESA that concluded that the Corps' river operations jeopardize endangered and threatened species. To avoid ESA violations, the biological opinion called for implementing a new regime of low summer flows by 2003. When the Corps' proposed 2003 operating plan did not include low summer flows, the environment groups sued.

Thus, there are six suits pending over the Corps' river management, that is, the South Dakota, Nebraska, and North Dakota 2002 suits, and the North Dakota, Blaske Marine, and American Rivers 2003 suits. The litigation was consolidated in the District of Minnesota. *In re Operation of the Missouri River System Litigation*, 277 F.Supp.2d 1378 (J.P.M.L. 2003). And on June 4, 2003, the Eighth Circuit issued an important decision in the dispute.

F. The Court of Appeals' Decision

The court below rejected the Corps' argument that its river operations are not subject to judicial review. It ruled that while the Corps has "a good deal of discretion" under the 1944 Flood Control Act to manage the river, its "discretion is not unconstrained." App. at 21. The Act sets forth a number of functions for the river system and the Corps has a duty to balance them. *Id.* The Corps' *Master Manual* also provides law needed for judicial review. *Id.* at 26.

After deciding that the Corps' actions are reviewable, the court below considered the propriety of the preliminary injunctions. It began its review of the 1944 Flood Control Act by citing *ETSI Pipeline Project,* 484 U.S. 495 (1988), for the proposition that the Act's "dominant functions" are flood control and maintaining downstream navigation. App. at 5. *See also id.* at 21, 32. It then reviewed the Corps' *Master Manual.*

Section 9-3 of the *Manual* contains a numbered list of six uses for which the system is to be operated. *Id.* at 23. The list "calls for sequential consideration" of the uses. App. at 6. *See also id.* at 32. In other words, since flood control is listed first, it is the pre-eminent purpose for which the river is to be managed, and since in this list navigation appears fourth and recreation sixth, the court ruled that navigation trumps recreation. *Id.* This interpretation of Section 9-3 was particularly important in light of the ruling that the *Master Manual* is binding. *Id.* at 22. Based on its interpretation of the *Master Manual* and Flood Control Act, the court below ruled that the injunctions issued by the North Dakota and South Dakota District Courts, even though they expired in late May of

2002 when the smelt spawn was complete, were improperly issued because they adversely affected navigation. *Id.* at 33-34. It ruled that the Nebraska District Court's injunction was proper because it ordered compliance with the *Master Manual*.

REASONS FOR GRANTING THE PETITION

Introduction

The decision below should be reviewed because it is inconsistent with the 1944 Flood Control Act, in which Congress directed that the river's reservoirs be managed as multi-purpose facilities, serving a number of interests, and with flexibility that adjusts to the basin's changing circumstances. Congress did not intend the river to be managed to favor a marginal $1 to $7 million a year navigation industry over a thriving recreation industry with a much greater economic value. Further, the Corps of Engineers, the agency responsible for administering the Flood Control Act, does not interpret the Act as giving navigation priority. The court below, however, failed to consider and respect this agency understanding.

This case creates a particularly strong claim on the Court's attention because the decision of the court below vests pervasive power over life in the basin with the federal government and, in particular, with the military. The impact on the basin from the government's construction and operation of the reservoirs has been, and will continue to be, immense. Towns were wiped out to allow for the permanent flood of the reservoirs, economies were disrupted, and ecologies turned upside down. Flood control protected downstream and upstream areas, and allowed

certain areas to flourish in safety. Downstream economies sought to capitalize on the heavily subsidized navigation allowed under the Act, but navigation has been in economic doldrums for decades. The upstream states likewise never enjoyed the economic boom anticipated from the proposed federal irrigation projects. The projects fell victim to political and other attacks. The upstream states did, however, invest in and develop fisheries and recreational facilities that have become vital to their economies. The magnitude of the federal impact alone merits this Court's attention.

Moreover, special attention is appropriate because the court below essentially held that Congress entrusted the Missouri River Basin's cultural, political, social, and economic development to the military. North and South Dakota have great respect for the military and are among the leaders in sending their youth into military service. The duties entrusted to the Army under the 1944 Flood Control Act are not, however, military duties, nor are they duties commonly entrusted to a branch of the military concerned with engineering problems. The duties here concern the day-to-day balancing of civilian political, social, and economic interests. It is appropriate that this Court extend its scrutiny to this case to ensure that the military adheres to Congressional standards in what is essentially a civilian dispute.

THE DECISION BELOW MISINTERPRETED THE 1944 FLOOD CONTROL ACT AND, CONSEQUENTLY, FAILED TO ACCORD RECREATION ITS PROPER ROLE IN MANAGING THE MISSOURI RIVER'S MULTI-PURPOSE FACILITIES

The 1944 Flood Control Act governs Missouri River operations. The Act, as discussed, not only had its origins

in but incorporates the Corps' and the Bureau's opposing plans, as reconciled in the Joint Report. App. at 90. The Joint Report, as well as the plans themselves, make it clear that recreation, at the minimum, is entitled to parity with other uses. The Flood Control Act itself contains provisions supporting this conclusion.

A. The 1944 Flood Control Act

The Flood Control Act's preamble sets forth several propositions that guide the Act's application. It expresses congressional policy recognizing state interests and rights "in determining the development of the watersheds within their borders." App. at 83. It recognizes a state's "interests and rights in water utilization and control" to protect to "the fullest possible extent established and potential uses." *Id.* The preamble expresses a congressional policy that seeks "comprehensive" development. *Id.* Thus, the preamble proclaims that a state's interests in its water resources are not to be compromised. If the decision below stands, the basin's comprehensive development will be hindered and the primary interest that North and South Dakota have in the Missouri River – its usefulness as a recreation resource – will be compromised.

Perhaps of greater significance is the preamble's instruction that navigation works are to be limited to those that provide "a substantial benefit" and that are "operated consistently with appropriate and economic use of the waters . . . by other users." *Id.* Navigation does not provide a substantial benefit to the basin. It provides less than 1% of the system's economic benefit, *Revised DEIS*, *supra* at 5-131, and favoring it hinders other appropriate and more economic uses.

Section 4 of the Act reveals that Congress had recreation in mind. The section authorizes the construction and maintenance of recreation facilities in reservoir areas and adds: "The water areas of all such reservoirs shall be open to public use . . . for boating, swimming, bathing, fishing, and other recreational purposes." App. at 87. *See also South Dakota v. Bourland,* 508 U.S. 679, 688-90 (1993). The water is open "without charge" and "ready access" to it shall be maintained. App. at 87. No use may be permitted that is inconsistent with state "laws for the protection of fish and game." *Id.* at 88. Section 4 creates recreation as an authorized project purpose and indicates that deference is to be given to the state's use of the areas for fish and recreation purposes. While the court below properly noted that the Act recognizes numerous uses, *id.* at 5-6, the Act itself contains neither language about primary or secondary uses, nor anything suggesting a ranking of uses.

B. The Joint Report

The Flood Control Act approved the Pick Plan and Sloan Plan, "as revised and coordinated" by the Joint Report. App. at 90. The Joint Report contains critical direction about the uses to which the facilities would be put. It states that development of the basin in accordance with the two plans, "as coordinated in the enclosed joint engineering report . . . will secure the maximum benefits for flood control, irrigation, navigation, power, domestic and sanitary purposes, wildlife, and recreation." App. at 102. Thus, recreation and wildlife are expressly included. Equally important, the Report does not contain a list of priorities. There is no division of uses into first class and second class; primary and secondary. Because the Joint Report, which Congress adopted through the Flood Control

Act, includes recreation as an authorized use and does not provide a list of priorities, the decision below merits review.

C. The Pick Plan (Doc. 475) and the Sloan Plan (Doc. 191)

The plans adopted by the Flood Control Act contain not only the plans, but additional comments from the Corps and Bureau as well as other agencies. They refer to recreation as an authorized use, the need for the basin's comprehensive development (which necessarily requires equitable consideration for all uses), and the need for flexible management to adjust operations when circumstances change.

1. The Pick Plan. The Pick Plan includes numerous descriptions of the proposed facilities and uses as "multiple-purpose." *E.g.*, H.R. Doc. 475, *supra*, at 1, 4, 18, 26, 30. There are even references to "maximum" multiple-purpose use. *Id.* at 3. The Pick Plan states an intent to develop a comprehensive project, the benefits of which will flow broadly throughout the basin. The Corps' Chief Engineer stated that all federal agencies reviewing the plan "agree that the maximum feasible multiple-purpose use of water and the broadest economic program of reservoirs for that type of use are the primary principles on which the planned development . . . of the Missouri River Valley should be based." *Id.* The plan "establishes a broad framework for comprehensive basin-wide improvements." *Id.* at 4. The plan's benefits "will be very great and widespread." *Id.* at 18. Expressly included among the Pick Plan's purposes were "wildlife" and "recreation." In addition to flood control benefits the plan also provides for the

most efficient use of Missouri River waters "for all purposes, including . . . wildlife, and recreation." *Id.* at 28-29.

An important characteristic of the Corps' plan was its flexibility. Document 475 includes the Department of Agriculture's statement of its understanding of the plan as "not necessarily final, but a framework around which the ultimate basin-wide plan can progressively be developed, with full recognition given to the best utilization of the waters . . . in accordance with the multiple-purpose principle." *Id.* at 12. The Corps' Chief Engineer commented on the plan's evolving nature. "Due allowances must be made for any changed conditions that may arise in the future. . . . The adjustment of water use to meet the changing needs of the Missouri Basin as a whole can and will be made." *Id.* at 3. "[S]teps can be taken to meet new economic situations that may arise." *Id.* The plan is "flexible" and provides "sufficient latitude to permit such modifications thereof and changes therein as may be found advisable." *Id.* at 4.

This flexibility is crucial for ordering present-day uses. While recreation was among the authorized uses, it did not always have the economic importance it does today. But now that the upstream states have developed their reservoirs into superior fisheries and recreational facilities, the Pick Plan's flexibility, and therefore the Flood Control Act's flexibility, must be implemented. In presenting the Pick Plan to Congress, the Chief Engineer stated that "preference can be given to the functions which contribute most significantly to the welfare and livelihood of the people of various parts of the basin." *Id.* at 3. The court below turned this on its head. It gives a preference to the function, navigation, that of *all* the Act's purposes

contributes the least to the basin's welfare and livelihood. *Revised DEIS, supra* at 5-131.

2. The Sloan Plan. Interior Secretary Ickes stated that his agency's Sloan Plan "contemplates utilization of the waters of the Missouri River beneficially for multiple purposes in the stabilization of the agriculture and economy of this vast basin." S. Doc. 191, *supra*, at 1. He added that "[s]ubstantial and material benefits would accrue through recreational use of the waters and facilities proposed; through their use in fish and wildlife conservation." *Id.* at 2. The Department of Interior's Board of Review described the Sloan Plan as a "comprehensive plan" for, among other things, the "recreational use of waters, conservation of fish and wildlife, and pollution abatement." *Id.* at 10. The Sloan Plan itself states:

> Every water resource and all feasible beneficial uses of water, such as aids to navigation, flood control . . . fish and wildlife preservation, and recreation, were taken into account in an effort to formulate a basin-wide plan most likely to yield the greatest good to the greatest number of people.

Id. at 17.

Significantly, the Sloan Plan, like the Pick Plan, was intended as flexible. It could be modified as "changes in physical and economic conditions make necessary." *Id.* And times do and have changed. For example, the 1979 *Master Manual* that the Corps uses to manage the river is outdated and requires revision, as the Corps acknowledges. *E.g., Revised DEIS* at 1-1, 1-3.

Any doubt that the Department of the Interior and its Bureau of Reclamation contemplated a broad program for

the basin and included recreation in their vision, is dispelled by the letter written by the Bureau's Commissioner and included in Document 475. The Commissioner, in commenting on the Pick Plan, stated that certain principles must govern the river's management. One of those principles is that the project must include "a wide variety of functions, including . . . fish and wildlife preservation and recreation." H.R. Doc. 475, *supra* at 6. The Commissioner added that the reservoirs "should be operated to obtain the maximum benefits . . . for fish and wildlife preservation, [and] recreation." *Id.* at 7. He stated that where the uses conflict, "preference should be given to functions which contribute most significantly to the welfare and livelihood of the largest number of people." *Id.* at 7.

D. Agency Interpretation of the Flood Control Act

The statement by the court below that the Corps has a duty to generally prefer navigation over recreation is surprising because not even the Corps takes that extreme position. The Corps has repeatedly stated that the 1944 Flood Control Act does *not* give navigation priority over recreation.

In a brief to the court below the Corps stated: "There is no statement in the Act . . . that navigation is always entitled to a priority over the needs of fish and wildlife." Consol. Reply Brf. of Fed. Defendants-Appellants at 10 (undated). Not only is the Act silent about priorities so too, the Corps added, is the legislative history. "The purposes identified in the legislative history, are not specifically identified as primary or secondary purposes and are not

prioritized in importance by Congress." *Id.* at 1. *See also id.* at 8-9. "[W]ith the exception of flood control, none of the purposes of the System automatically takes precedence over the other purposes." *Id.* at 6. In another brief to the court below the Corps stated that the Pick and Sloan Plans identify broad objectives, "listing among other goals, flood control, irrigation, navigation, power, wildlife, and recreation." Consol. Brf. of Fed. Defendants-Appellants at 24 (undated). At oral argument before the court below, the Corps' attorney was asked, "[are] navigation and recreation equal or is navigation higher?" He answered: "Our view of it is that it should be equal, that we should try to support the navigation season and we should try to support recreation."

In 1992 the Department of Justice wrote North Dakota: "Congress did not assign a priority to these [project] purposes." Letter from B.H. Hartman, Acting Asst. Att'y Gen. Env't & Nat. Res. Div., Dep't of Justice, to N.J. Spaeth, N.D. Att'y Gen. (Mar. 10, 1992). Rather, "it was contemplated that the Corps . . . would balance these functions in order to obtain the optimum development and utilization of the water resources of the Missouri River Basin to best serve the needs of the people." *Id.*

Corps officials have stated under oath that all project purposes should receive equal consideration. Depo. of J.P. Elmore, Chf. of Operations, Const. & Readiness, U.S. Corps of Engineers at 34-42, *South Dakota, et al. v. Bornhoft, et al.,* No. CV-91-26 (D. Mont. July 14, 1992). In 1993 testimony the Corps' Col. Schaufelberger stated that "nothing in the law" gives preference to navigation over recreation. *Hrg. Before the Comm. on Env't & Pub. Works* (Oct. 1, 1993, Glendive, Mont.) (reprinted in 141 Cong. Rec. S3744-04, at S3755 (1995)). The Colonel added:

> [T]he law does not discriminate. The law says in the purpose of the reservoirs . . . there is no priority established. So there is nothing in the law that says there has to be one priority over the other. The only priority established in the law is the O'Mahoney-Milliken amendment, which specified that consumptive use has priority over other purposes. That's the only priority that I'm aware of that is specified by law.

Id. At a public meeting the Corps' Gen. Witherspoon stated that while flood control is given priority, "[a]fter that we don't have a set order or priorities." *Corps of Engineers Pub. Mtg. on Missouri River Master Water Control Manual Rev. & Update,* Trans. at 38 (June 18, 1990, Council Bluffs, Iowa).

Thus, the Corps has often and consistently stated that navigation does not take precedence over recreation. Its statements are considered and authoritative, and have been made by key Corps officials as well as the Department of Justice. This Court has "long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." *Chevron, USA, Inc. v. Natural Res. Def. Council,* 467 U.S. 737, 844 (1984). The degree of deference may vary with the circumstances. *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001). Useful considerations are the degree of the agency's care, consistency, formality, and expertness, and the persuasiveness of the agency position. *Id. See also Skidmore v. Swift & Co.*, 323 U.S. 134, 139-40 (1944).

The Corps' statements have been consistent. They have been made in formal settings, such as congressional and judicial hearings, and clearly upon careful, not cursory

thought. And the statements are persuasive, as indicated by the Government Accounting Office's independent analysis of the governing law. Its analysis "did not reveal a statutory scheme for regarding project purposes . . . as primary or secondary." U.S. Gen. Accounting Office, *Water Resources, Corps Management of Ongoing Drought in the Missouri River Basin* 33 (Jan. 1992).

E. The Actions of the Corps Belie its Words, Leading to the Present Controversy

As noted above, this litigation was precipitated by the Corps' actions in the spring of 2002, actions that challenged plans of state biologists. Since the closing of the Oahe Dam in 1958 South Dakota has worked hard to turn Lake Oahe into a nationally known, trophy walleye destination. In 1997, however, the Corps flushed from the reservoir a half a billion rainbow smelt, the forage fish that support the walleye. App. at 38. This action, combined with others, produced a crisis in the walleye. The South Dakota District Court found that Lake Oahe had become "full of hungry, stunted walleyes in poor condition." *Id.* at 39. In the spring of 2002, South Dakota's biologists informed the Corps that conditions were near ideal for recovery of the forage fish population; all that was needed to protect the smelt eggs was a stable or rising water level in Lake Oahe for a limited period. *Id.* at 8. Nonetheless, the Corps announced its intention to drop Lake Oahe's water level approximately two feet from mid-April to mid-May. This action would have destroyed most of Oahe's smelt eggs; the eggs would have dried out and died.

The South Dakota District Court thus, after hearings, issued both a TRO and preliminary injunction. The court

carefully considered the question of how the Corps had historically, and recently, preferred downstream navigation over upstream fish and recreation. It also had before it "very persuasive and detailed" evidence showing "the rather meager, if any, economic impact downstream navigation produces." *Id.* at 59. In 1960 the Corps predicted commercial traffic would increase to five million tons by 1980. Baumel & Van Der Kamp, *supra* at 1. It peaked at 3.3 million tons in 1977 and ever since had been in precipitous decline. *Revised DEIS* at 3-145, 3-146.

The District Court concluded that the Corps does not give recreation interests proper consideration. "Whenever a water shortage occurs, it is the Corps' practice to require all or some of the upstream states . . . to 'take the hit.'" App. at 58. "[I]t is clear from the evidence that the Corps, in times of low water . . . always chooses to seriously impact upstream states to continue navigation, 'come Hell or low water.' The more dire the water conditions upstream, the more water that is released for downstream purposes." *Id.* Even when the upstream states make a "modest" request, "the Corps refuses to abide or even properly consider such requests." *Id.*

F. The Court of Appeals erred in its evaluation of the applicable law.

The critical conclusion of the court below was that the 1944 Flood Control Act obligates the Corps to give priority to flood control and navigation. But as discussed above, (a) the Act's text does not support this conclusion, (b) the Corps' pronouncements before courts and elsewhere repudiate this conclusion, (c) the GAO evaluation does not support it, and (d) putting this conclusion into practice

gravely harms recreation, fish, and wildlife interests, to the benefit of inconsequential navigation. The source of the error below was the court's misreading of Supreme Court precedent. This Court has twice considered the 1944 Flood Control Act. Its most recent examination was in *South Dakota v. Bourland*, 508 U.S. 679 (1993), in which the Court reviewed the Act's recreation, fish, and wildlife provisions, and determined that the state had exclusive fish and wildlife jurisdiction over non-Indians on Missouri River waters and on Corps' land adjoining the reservoirs.

While the court below did not mention *Bourland*, it cited *ETSI Pipeline Project v. Missouri*, 484 U.S. 495 (1988), to support its view that the 1944 Flood Control Act's "dominant functions" are flood control and navigation. App. at 5, 21, 32. *ETSI*, however, concerned a contract signed by the Secretary of the Interior allowing a private company to withdraw water from Lake Oahe for use in a slurry pipeline to transport coal from Wyoming to the southeastern United States. *ETSI*, 484 U.S. at 497-98. Downstream states challenged the Secretary's authority to enter the contract without the Corps' approval. Thus, the case was about the division of authority between the Corps and Interior. *Id.* at 499. It did not involve an upstream-downstream dispute over rationing water, or over priorities.

The Court ruled that the Secretary did not have unilateral authority to authorize the withdrawal. *Id.* at 513-17. It found explicit language in the Flood Control Act supporting this conclusion. Because the Act "speaks directly to the dispute . . . [t]hat is 'the end of the matter.'" *Id.* at 517. And that is where the court below should have left *ETSI*; as a decision addressing the jurisdiction of federal agencies over a water withdrawal. *ETSI* should not

have been used by the court below as the springboard to decide an entirely different issue, that is, whether the Corps, in operating the river, must favor navigation over recreation.

The court below erred in finding that *ETSI* had ruled that navigation was a "dominant function" of the reservoirs. App. at 5, 21, 32. While the "dominant function" language does appear in *ETSI,* 484 U.S. at 512, it was used in the context of discussing only one of the plans offered to Congress – the Sloan Plan. *Id.* The 1944 Flood Control Act was, as established above, a combination of all the Sloan Plan and Pick Plan components. The Pick Plan, as described in *ETSI*, 484 U.S. at 500, expressly included "wildlife" and "recreation." The Flood Control Act itself approved the "general comprehensive plans set forth in [the Pick and Sloan Plans] as revised and coordinated by Senate Document 247." *Id.* at 502. The Sloan Plan thus could not be accurately cited to set out "dominant functions," because it was only part of the plan ultimately adopted in the Act. The court below erred in its heavy reliance on *ETSI's* Sloan Plan citation, *see* App. at 5, 21, 32, while ignoring *ETSI's* reference to the Pick Plan and its inclusion of "wildlife" and "recreation." *ETSI*, 484 U.S. at 500.

This Court is thus respectfully requested to authoritatively define what priorities bind the Corps of Engineers and the degree of flexibility that it has in applying those priorities. North and South Dakota urge that undertaking this task is appropriate because of the inconsistencies in words and actions of the military officers who operate the reservoirs. Further, the very nature of the arrangement created by Congress calls for judicial supervision of military officers performing functions so vital to the daily lives

of millions of citizens throughout the Missouri River Basin.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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330 F.3d 1014

United States Court of Appeals,
Eighth Circuit.

State of SOUTH DAKOTA, and William J. Janklow, Governor, Plaintiffs - Appellees,
v.
Lt. Colonel Kurt F. UBBELOHDE, District Engineer, Omaha District, United States Army Corps of Engineers, and General David A. Fastabend, Commander, NW Division, Portland, Oregon, Defendants,
MO-ARK Association, formerly known as Missouri-Arkansas River Basins Association, Movant - Appellant.
State of South Dakota, and William J. Janklow, Governor, Plaintiffs - Appellees,
v.
Lt. Colonel Kurt F. Ubbelohde, District Engineer, Omaha District, United States Army Corps of Engineers, and General David A. Fastabend, Commander, NW Division, Portland, Oregon, Defendants,
Ergon Asphalt and Emulsions, Inc.; Magnolia Marine Transport Company; Blaske Marine, Inc.; Koch Materials Company; Mid-West Terminal Warehouse Company, Inc.; Tosco, a subsidiary of Phillips 66 Company; Jebro, Incorporated, and Memco Barge Line, Inc., Movants - Appellants.
State of South Dakota, and William J. Janklow, Governor, Plaintiffs - Appellees,
v.
Lt. Colonel Kurt F. Ubbelohde, District Engineer, Omaha District, United States Army Corps of Engineers, and General David A. Fastabend, Commander, NW Division, Portland, Oregon, Defendants,

State of Nebraska, Movant - Appellant.
State of South Dakota, and William J. Janklow,
Governor, Plaintiffs - Appellees,
v.
Lt. Colonel Kurt F. Ubbelohde, District Engineer,
Omaha District, United States
Army Corps of Engineers, and General David A.
Fastabend, Commander, NW
Division, Portland, Oregon, Defendants - Appellants.
State of Nebraska, also known as Don Stenberg,
Attorney General of the State of
Nebraska, ex rel., Plaintiff - Appellee,
v.
State of Missouri, Intervener Below - Intervener on Appeal,
Kurt F. Ubbelohde, Lt. Colonel, District Engineer,
Omaha District, United States Army Corps of Engineers,
and General David A. Fastabend, Commander, NW
Division, Portland, Oregon, Defendants - Appellants,
State of Iowa, Amicus on Behalf of Appellee.
State of North Dakota, and John Hoeven,
Governor, Plaintiffs - Appellees,
v.
Lt. Colonel Kurt F. Ubbelohde, District Engineer,
Omaha District, United States Army Corps of Engineers,
and General David A. Fastabend, Commander, NW
Division, Portland, Oregon,Defendants - Appellants.
State of Missouri, Intervener on Appeal.

Nos. 02-2133SD, 02-2144SD, 02-2185SD,
02-2187SD, 02-2191NE and 02-2305ND.

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Rehearing and Rehearing En Banc Denied Sept. 30, 2003.*

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* Judge Bye would grant the petitions for rehearing en banc.

Robert J. Vincze, argued, Denver, CO, for appellant in No. 02-2133.

John P. Guhin, argued, Pierre, SD, for appellee in Nos. 02-2133, 02-2144, 02-2185 and 02-2187.

Mark F. Marshall, argued, Sioux Falls, SD, for appellant in No. 02-2144.

Jon C. Bruning, argued, Lincoln, NE, for appellant in No. 02-2185.

Robert H. Oakley, argued, Washington, DC, for appellant in Nos. 02-2187, 02-2191 and 02-2305.

William J. Bryan, argued, Jefferson City, MO, for intervenor in No. 02-2191.

Charles M. Carvell, argued, Bismarck, ND, for appellee in No. 02-2305.

Before WOLLMAN, RICHARD S. ARNOLD, and MELLOY, Circuit Judges.

RICHARD S. ARNOLD, Circuit Judge.

This case arises out of the management of the Missouri River, which runs through seven states in its journey from Montana to Missouri. The United States Army Corps of Engineers is charged with the responsibility of managing this river and its attendant reservoirs. In carrying out this charge, the Corps must strike a balance among many interests, including flood control, navigation, and recreation. In good times, the Corps can accommodate all such interests, but, when facing a continuous drought, the Corps is forced to make hard choices. In the Spring of 2002, the Missouri River Basin was in the midst of just such a prolonged drought. The Corps decided to release

water from a single reservoir, Lake Oahe, to maintain downstream river flow. The State of South Dakota, where Lake Oahe is located, sought and received an injunction barring this release. This action led other states to seek similar injunctions. Within a period of days, courts had put four of the six main stem reservoirs off limits for releases. The State of Nebraska then sought and received an injunction requiring the Corps to maintain downstream river flow.

In this case we review the decisions of three district courts to issue preliminary injunctions binding the Corps. District Courts in North Dakota and South Dakota enjoined the Corps from drawing down reservoirs located in their states for short periods of time, and a Nebraska District Court ordered the Corps to abide by its governing Missouri River operations manual. We reverse the judgments of the District Courts in North Dakota and South Dakota and affirm the judgment of the Nebraska District Court.

I.

Congress enacted the Flood Control Act of 1944 to provide for the orderly management of the Missouri River Basin. Pub.L. No. 78-534, 58 Stat. 887 (1944). The Act had numerous purposes. First, it entrusted the Army Corps of Engineers with the task of managing the River basin. The Corps is charged, for example, with constructing and managing the dams and reservoirs created by the Act, 16 U.S.C. § 460d, making contracts for use of surplus water available at the reservoirs, 33 U.S.C. § 708, and "prescrib[ing] regulations for the use of storage allocated for flood control or navigation at all reservoirs . . . the operation of any such project shall be in accordance with such

regulations," 33 U.S.C. § 709.[1] The Act thus granted the Corps considerable power over the River basin.

The Act also laid out certain substantive interests that it was to serve. The dominant functions of the Flood Control Act were to avoid flooding and to maintain downstream navigation. *ETSI Pipeline Project v. Missouri,* 484 U.S. 495, 512, 108 S.Ct. 805, 98 L.Ed.2d 898 (1988). The Act's dominant functions were expressed repeatedly in three Congressional Documents: Senate Documents 191 and 247 and House Document 475. See Flood Control Act Section 9, 58 Stat. at 891. House Document 475, which represented one of two competing plans, confirmed this view, stressing flood control. H.R. Doc. No. 475, 78th Cong., 2d Sess. 28-29 (1944). At the same time, however, the Act recognizes secondary uses of the River including irrigation, recreation, fish, and wildlife. See Flood Control Act Section 4, 58 Stat. at 889-90; 33 U.S.C. § 708; 43 U.S.C. § 390. The House Document just cited noted that the management plan "would also provide for the most efficient utilization of waters of the Missouri River Basin for all purposes, including irrigation, navigation, power, domestic and sanitary purposes, wildlife, and recreation." H.R. Doc. No. 475, *supra,* at 29. Senate Document 247, which reconciled the competing proposals, included a discussion of the purposes of Lake Oahe: "the irrigation of 750,000 acres of land . . . as well as to provide useful storage for flood control, navigation, the development of

[1] The Act also gave certain responsibilities to the Department of the Interior. See generally *ETSI Pipeline Project v. Missouri,* 484 U.S. 495, 108 S.Ct. 805, 98 L.Ed.2d 898 (1988). These responsibilities are not at issue in this case.

hydroelectric power, and other purposes." S. Doc. No. 247, 78th Cong., 2d Sess. 3 (1944). Thus, the Flood Control Act provided the Corps with a wide array of interests to consider in regulating the River.

While the Flood Control Act laid out broad goals, the intricacies of the River basin required the Corps to work out a specific management plan. The Corps devised this more specific management plan and published it in the *Missouri River Main Stem Reservoir System Reservoir Regulation Manual*, commonly referred to as the Master Manual, which explains how the Corps is to go about managing the River system. The most recent version of the Master Manual was promulgated in 1979, although the Corps has been in the process of revising the manual since the late 1980's, and the Corps assures this Court that the revisions should be completed quite soon.

The Master Manual accomplishes numerous goals. For one, Section IX lays out the "general approach" that is to be used to plan reservoir operation, an approach that calls for sequential consideration of the various interests. Predictably, it indicates that flood control will be provided for first. After flood control, the Manual calls for the Corps to consider (in order) irrigation, water supply and water-quality requirements, navigation and power, and finally recreation, fish, and wildlife. Notably, the final provision reads: "insofar as possible without serious interference with the foregoing functions, the reservoirs will be operated for maximum benefit to recreation, fish and wildlife." Master Manual Section 9-3. In addition to laying out this general approach, the Master Manual includes more specific technical guidelines. Thus, the Manual lays out minimum flows that are to be maintained at different points on the River, Master Manual Section 9-17, and

methods for deciding the length of the navigation season based upon river flow at certain times of the year. Master Manual Section 9-18. The Master Manual also explains that the Corps has always promulgated Annual Operating Plans, which lay out the Corps's particular plan for the year. Master Manual Sections 9-47 & 9-48. These plans also give the public notice of the Corps's plan for operating the system, allowing interested individuals to order their affairs for the year.

The dispute in this case arose out of the prolonged drought conditions that the Missouri River has been experiencing over the last several years. This shortage of water has forced the Corps to make decisions about the allocation of water between the states and between different interests. Pursuant to its 2002 Annual Operating Plan, the Corps decided to release water from Lake Oahe in South Dakota to maintain downstream navigation on the Missouri River. At the same time, the Corps was planning on holding water levels constant at the other five reservoirs. The Corps generally lowers only one reservoir if releases are necessary to maintain navigation, and it attempts to shift this burden from year to year. Because Lake Oahe's water level had not been reduced the year before (it had actually increased), the Corps chose Lake Oahe to bear the burden of the drought in 2002.

The Corps's plan to release water from Lake Oahe was troubling to South Dakota, because it wanted the water level of Lake Oahe to be held constant from late April to late May to allow for a fruitful fish spawn during that period. Lake Oahe has become a well-known destination for trophy walleye fishing. Since 1997, however, the State noticed a marked reduction in the quality of fish in the lake – a reduction that has reduced recreation at the lake.

The State concluded that this reduced quality was caused by a sizable decrease in the number of rainbow smelt, the prey fish of the walleye. This decrease was due in part to a massive water release from Lake Oahe in 1997 and in part to the overpopulation of walleye. South Dakota set out to remedy this problem by allowing for increased walleye fishing, which would reduce the number of predators of the rainbow smelt. After this increased fishing, the State concluded that the rainbow smelt were poised to have an extremely fruitful spawn in 2002. Because the smelt lay their eggs in shallow water, however, the spawn would not be successful if the water level was reduced even by as little as six inches. South Dakota therefore asked the Corps to forego its plans to release water from Lake Oahe during the smelt's spawning season – late April until late May. The Corps indicated that it nevertheless intended to abide by its annual operating plan, which called on the Corps to continue the releases from Lake Oahe to maintain downstream navigation.

On April 25, 2002, after the Corps refused to change its plans, the State of South Dakota filed suit in the District Court for South Dakota. The suit claimed that the Corps acted arbitrarily and capriciously in maintaining downstream navigation rather than maximizing recreation at upstream reservoirs. The suit sought a declaration that the Corps's practice of always requiring one of the reservoirs to bear the burden of a drought was unlawful. The suit sought to enjoin the Corps from releasing water from Lake Oahe until after the spawning season. After a hearing, the Court entered a temporary restraining order requiring the Corps to maintain the water level until a preliminary-injunction hearing could be held. When the Court entered this restraining order, the Corps announced

its intention to release water from Lake Francis Case to offset its inability to lower Lake Oahe. Lake Francis Case is also in South Dakota, and the State requested that the District Court consider the propriety of lowering Lake Francis Case at the preliminary injunction hearing. Before the preliminary-injunction hearing, the State of Nebraska and numerous private entities moved to intervene in the case, but the Court denied these motions. After hearing arguments from all sides on May 9 and 10, the District Court entered a preliminary injunction that required the Corps to maintain the water level at both Lake Oahe and Lake Francis Case until May 25 – the end of the spawning season.

The South Dakota Court's injunction had a cascading effect. To cope with the injunction, the Corps planned to lower Lake Sakakawea, which is located in North Dakota. The State of North Dakota brought suit in the federal District Court in North Dakota to enjoin the Corps from lowering this reservoir. The District Court entered a temporary restraining order on May 12, which required the Corps to maintain the lake's water level. When the TRO expired ten days later, the parties agreed that it would be converted into a preliminary injunction.[2]

When it was not allowed to intervene in the South Dakota case, the State of Nebraska went to the federal District Court in Nebraska seeking a preliminary injunction that would require the Corps to operate the River

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[2] The Corps then planned to lower Fort Peck Reservoir in Montana, but as in North Dakota and South Dakota, Montana went to court and obtained an injunction barring any release. This injunction ran its course, and the State of Montana has since dropped its suit against the Corps.

according to the Master Manual and the 2002 Annual Operating Plan. On May 13, the District Court entered an injunction ordering as much. The Court noted that it was "reluctant to interfere with the discretion of the Corps, but must recognize that court orders in other jurisdictions designed to safeguard interests of upstream users are quickly stripping the Corps of Engineers of its ability to function as an objective steward of the water flows in the Missouri River Basin." Addendum to Corps's Brief 29. This order left the Corps in a thorny predicament. The Nebraska order required it to maintain navigation, but with Lakes Oahe, Francis Case, and Sakakawea and Fort Peck Reservoir off limits, the Corps was forced to rely on the two smallest reservoirs for the releases. Ultimately, downstream flows were reduced, and navigation and other downstream interests suffered.

The Corps immediately appealed the judgments of each of the District Courts. Additionally, Nebraska and the other proposed intervenors have appealed the South Dakota District Court's orders denying their motions to intervene. This Court stayed each of the injunctions on May 22, 2002. The injunctions in North Dakota and South Dakota expired by their own terms on May 25, 2002. The Nebraska District Court's injunction has not expired and will go into effect again if we lift our stay.

II.

We must decide whether the three District Courts erred in enjoining the Corps and whether the South Dakota Court erred in denying the motions to intervene. We conclude that the District Courts in North Dakota and South Dakota erred in enjoining the Corps from lowering

reservoirs to maintain navigation, and that the District Court in Nebraska correctly ordered the Corps to follow the Master Manual. We also conclude that the South Dakota District Court erred in denying the motions to intervene.

A.

Before reaching the merits of this case, we must consider whether the expiration of the preliminary injunctions in North Dakota and South Dakota renders the appeals of those orders moot. Although none of the parties to this appeal has urged this Court to dismiss the case, we must nevertheless satisfy ourselves that this case is not moot. See *Kremens v. Bartley*, 431 U.S. 119, 136, 97 S.Ct. 1709, 52 L.Ed.2d 184 (1977). We are so satisfied for numerous reasons. First, we note that the injunction issued by the District Court in Nebraska is still in effect, so the Corps's appeal from that injunction is clearly not moot, and many, if not all, of the substantive issues raised by the South Dakota and North Dakota appeals will be decided anyway.

The North Dakota and South Dakota cases fall within the well-known "capable of repetition, yet evading review" exception to the mootness doctrine. *Weinstein v. Bradford,* 423 U.S. 147, 149, 96 S.Ct. 347, 46 L.Ed.2d 350 (1975). This exception applies when two conditions are met: "(1) the challenged action [is] in its duration too short to be fully litigated prior to cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party [will] be subject to the same action again." *Spencer v. Kemna,* 523 U.S. 1, 17, 118 S.Ct. 978, 140 L.Ed.2d 43 (1998).

A preliminary injunction that bars the Corps from releasing water from the reservoirs during spawning will never last long enough to allow for full litigation because of the brevity of spawning season. Thus, if these actions were to recur, they would continually evade review. Moreover, we have every reason to suspect that these events will recur. On previous occasions, we were inclined to think this type of litigation would not repeat itself. See *South Dakota v. Hazen,* 914 F.2d 147 (8th Cir.1990) (deciding case was moot because the injunction had expired); *cf. Missouri ex rel. Nixon v. Craig,* 163 F.3d 482 (8th Cir.1998) (deciding that a challenge to the Corps's annual operating plan was moot because the plan had lapsed). But repetition now seems quite likely. At oral argument the parties agreed that drought conditions continue along the River, meaning that the Corps will again be forced to choose between releasing water from the reservoirs or letting downstream navigation suffer. We have every reason to believe that the Corps will choose to release water from at least one reservoir, and we are confident that the legality of such a release would again be challenged in the courts. In the end, then, we are persuaded that the questions presented in this appeal are likely to recur, yet will evade review when they do. Therefore, the expirations of the preliminary injunctions do not render the appeals moot.

B.

Next, we must decide whether the South Dakota District Court erred in refusing to allow various parties to intervene in the case brought by the State of South Dakota. After the initiation of the suit by South Dakota, the District Court received three separate motions to intervene as of right under Federal Rule of Civil Procedure

24(a)(2): one from MO-ARK Association, one from Ergon Asphalt and Emulsions, Inc., and other corporate entities, and one from the State of Nebraska.[3] A party seeking to intervene must establish both that it has standing to complain and that the elements of Rule 24(a)(2) are met. Rule 24(a)(2) requires that the proposed intervenor establish that it claims an interest in the property or transaction which is the subject of the litigation, that disposition of the litigation in the party's absence may impede or impair its ability to protect its interest, and that the interest is not adequately represented by the current parties to the suit. Fed.R.Civ.P. 24(a)(2); *Jenkins v. Missouri,* 78 F.3d 1270, 1274 (8th Cir.1996). The South Dakota District Court concluded that the proposed intervenors failed to prove that they had standing and failed to meet the requirements of Rule 24(a)(2). Additionally, the Court concluded that allowing the State of Nebraska to intervene would be problematic because it would put Nebraska and South Dakota on opposite sides of the dispute, thus bringing the case within the exclusive jurisdiction of the Supreme Court.

We review the District Court's conclusion that these parties were not entitled to intervene *de novo. Arrow v. Gambler's Supply, Inc.*, 55 F.3d 407, 409-10 (8th Cir.1995). The proposed intervenors presented sufficient evidence of their interest in the case to give them standing to intervene.

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[3] The proposed intervenors also sought permissive intervention, and the State of Nebraska moved to be allowed to join as an indispensable party under Rule 19. Because we ultimately rule that each of the intervenors was entitled to intervene as a matter of right, we need not reach these alternative theories.

Each of the proposed intervenors presented substantial evidence that the remedies sought by the State of South Dakota threatened it with serious injury. MO-ARK represents numerous interests along the Missouri River, including members with interests in navigation, agriculture, and water treatment. Ergon and the corporate entities that joined its motion to intervene utilize the lower Missouri River to transport their goods. And the Missouri River runs through the State of Nebraska. Each of these proposed intervenors claimed an interest in the litigation based upon the fear that the Court's ruling would lead to decreased water flow downstream. They offered to present significant evidence that a reduction in the flow of the River would cause a great deal of harm to downstream interests. Among the threats were an interruption in their ability to navigate the River, problems for power plants that relied upon the River water for cooling, and decreases in water quality for community water supplies. Moreover, the parties presented evidence that decreasing the flow for even a short period of time could be troublesome because of the effects that such a short-term reduction could have on wildlife. Specifically, the parties presented evidence that if the water levels were decreased, two endangered species of birds would nest on the newly exposed river bed. Once these birds nested, the proposed intervenors feared, the water flow could not be increased until after the fledgling birds could leave the nest. Thus, according to this argument, flow reduction could not be limited to a short term.

The Court did not disagree with this evidence, but merely held that it did not believe that its order would lead to a reduction in downstream flow. The Court noted that it was not ordering the Corps to reduce downstream

flows, but only to maintain the water levels at the South Dakota Reservoirs. Thus, the Corps was free to maintain the downstream flows by lowering water levels at other reservoirs. The Court found that because its preliminary order would not require a reduction in flow, the proposed intervenors did not have an interest in the litigation. This finding led the Court to reject the motion to intervene not only on Rule 24 grounds but also for lack of standing. However, the proposed intervenors did not move to intervene in only the preliminary-injunction hearings. Instead, they sought to intervene in the whole case. As the proposed intervenors explain, the State of South Dakota was seeking more than a preliminary injunction for the short period of time that it lasted. South Dakota is also seeking a more permanent, forward-looking declaration that will affect the way the Missouri River is managed in the future. South Dakota alleges that the Corps should "give all water uses equal consideration while the Master Manual Review is undergoing a revision," First Amend. Compl. ¶ 39, and to accomplish this goal seeks injunctive relief "to prevent irreparable harm to the fisheries of the mainstream reservoirs, when the harm is inflected [sic] to benefit downstream navigation." *Id.* at ¶ 55. If South Dakota ultimately prevails in this case, the Corps may be forced to reduce downstream flows in drought conditions to maintain the water levels at all of the reservoirs. When we consider the effect that an ultimate ruling for South Dakota might have, we think the proposed intervenors presented sufficient evidence of a threatened injury to give them standing.

The District Court did not base its decision solely upon its conclusion that the proposed intervenors lacked standing; the Court also concluded that the proposed

intervenors had not proved that they were entitled to intervene under Rule 24(a)(2). The Court first concluded that the proposed intervenors had not shown that they had an interest in the litigation. Again, we disagree. Success by South Dakota in the whole litigation would impair the proposed intervenors' interests in the operation of the River.

The Court also concluded that the proposed intervenors were not entitled to participate in the action because their interests were adequately represented by the Corps under the *parens patriae* theory. This theory creates a presumption that a government agency will represent the interests of all citizens in cases raising matters of sovereign interest. *Mausolf v. Babbitt,* 85 F.3d 1295, 1303 (8th Cir.1996). Proposed intervenors can rebut this presumption, however, if they can make a strong showing of inadequate representation, for example, by showing that the proposed intervenor's interest is not subsumed within the general interests of the public. *Id.* The District Court concluded that the presumption applied in this case, and that the proposed intervenors had not overcome it. We respectfully disagree.

The *Mausolf* case is instructive. There, snowmobile enthusiasts sued the Secretary of the Interior, seeking to enjoin the enforcement of certain snowmobiling restrictions in a federal park. Various conservationist organizations moved to intervene in the case for fear that the Secretary would settle the case or back away from his rules. The District Court denied intervention, partly because of the *parens patriae* presumption. This Court reversed, finding that the presumption was rebutted. We noted that the government must represent the interests of all of its citizens, which often requires the government to

weigh competing interests and favor one interest over another. Where such conflicts exist, "even the Government cannot always adequately represent conflicting interests at the same time." *Id.* at 1303.

This case presents just such a conflict. The Corps is charged with managing the Missouri River system as a whole – a charge that requires it to balance the interests of the upstream and downstream users. The proposed intervenors, on the other hand, wish to represent exclusively downstream interests. Indeed, South Dakota's lawsuit itself indicates a fear that the Corps cannot adequately represent the interests of all parties. The very crux of this suit is that the Corps has failed in its representative role. Yet South Dakota asks this Court to hold that the Corps will adequately represent downstream users. We decline to do so. Given that the Corps is asked to balance multiple interests, we conclude that it cannot adequately represent the interests of downstream users in this case. The *parens patriae* presumption, therefore, does not present an obstacle to intervention. Thus, the proposed intervenors met the requirements for intervention under Rule 24(a)(2) and were entitled to intervene.

The District Court presented an additional reason for not allowing the State of Nebraska to intervene – the Court feared that doing so would strip the Court of jurisdiction. The Court worried that allowing Nebraska to intervene would create a case or controversy between two states – a controversy within the Supreme Court's exclusive original jurisdiction. This was not an appropriate reason for rejecting Nebraska's motion to intervene, however, because, even had Nebraska been allowed to intervene, the controversy would not have been between South Dakota and Nebraska. The Supreme Court's exclusive jurisdiction

under 28 U.S.C. § 1251(a) applies only when one state seeks relief from another state. See *Mississippi v. Louisiana,* 506 U.S. 73, 78 n. 2, 113 S.Ct. 549, 121 L.Ed.2d 466 (1992) ("Louisiana's intervention is also unaffected by § 1251(a) because it does not seek relief against Mississippi."); see also *United States v. Nevada*, 412 U.S. 534, 537, 93 S.Ct. 2763, 37 L.Ed.2d 132 (1973) (per curiam) ("The complaint . . . is not one alleging a case or controversy between two States within the exclusive jurisdiction of this Court, under 28 U.S.C. § 1251(a), but a dispute between the United States and two States over which this Court has original but not exclusive jurisdiction under § 1251(b)(2)."); *Connecticut v. Cahill*, 217 F.3d 93 (2d Cir.2000) (holding that Connecticut could maintain an action against officers of New York in federal district court because the action was styled as a suit against officers, not the state). In this case, the controversy is between each of the states and the Corps. Although the states would have had adverse interests, each state would be seeking relief from the Court against the Corps. Thus, allowing intervention by Nebraska would not strip the District Court of jurisdiction.

The District Court's denials of the motions to intervene are reversed.

III.

We now turn our attention to the question of whether the District Courts erred in issuing preliminary injunctions in these cases. The decision to issue a preliminary injunction is within a district court's discretion in the first instance. The following factors govern the exercise of that discretion:

> Whether a preliminary injunction should issue involves consideration of (1) the threat of irreparable harm to the movant; (2) the state of the balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest.

Dataphase Systems, Inc. v. C L Systems, Inc., 640 F.2d 109, 113 (8th Cir.1981) (en banc). We review a district court's decision to grant a preliminary injunction for abuse of discretion, and can reverse such an injunction only if the district court "clearly erred in its characterization of the facts, made a mistake of law, or abused its discretion in considering the equities." *Bhd. of Maint. of Way Employees v. Burlington Northern R.R.*, 802 F.2d 1016, 1020 (8th Cir.1986).

The facts of these cases are largely undisputed, and the District Courts did not clearly err in their fact finding. All sides seem to agree that each of the plaintiffs can show that they will suffer irreparable harm absent the injunctions imposed. The States of North Dakota and South Dakota demonstrated that the population of fish in the reservoirs would decrease if the water levels were not maintained. Each state presented evidence that such a decrease would lead to a decrease in recreation on the reservoirs. Nebraska presented evidence that it would be harmed by the Corps's failure to follow the Master Manual, because the decreased flows would harm many of its citizens. In each case, the District Court concluded that the complaining party would suffer irreparable harm without an injunction. There was no clear error here.

The balance-of-harms and public-interest criteria present closer questions, but we need not pursue these

issues. The dispositive issue on this appeal is the likelihood that each plaintiff would succeed on the merits. In each of these cases, the plaintiffs are challenging agency actions. Thus, our review is guided by the Administrative Procedure Act. Under the APA, district courts review agency actions to determine whether they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). In this case, however, the review is more complicated, because the Corps maintains that its actions are not subject to judicial review at all. It contends that the Flood Control Act commits these decisions to the Corps's discretion. See 5 U.S.C. § 701(a)(2). Thus, before considering whether the Corps's actions were unlawful or were arbitrary and capricious, we must decide whether the Corps's actions are subject to judicial review.

A. Is There Law To Apply?

The Corps first argues that the District Courts erred because its actions are not subject to judicial review. As a general rule, courts presume that Congress intended agency action to be subject to judicial review. *Kenney v. Glickman*, 96 F.3d 1118, 1124 (8th Cir.1996); see also 5 U.S.C. § 702. There is a very narrow exception to this presumption "applicable in those rare instances where statutes are drawn in such broad terms that in a given case there is no law to apply." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971) (internal quotations omitted). This exception is quite narrow and does not apply where statutes provide even minimal guidance to limit agency discretion. *Id.* at 411-13, 91 S.Ct. 814 (holding that an agency action was subject to review because the granting

statute provided factors for the agency to consider in making the decision). And courts can find law to apply either "in the underlying statute or in the regulations by the agency interpreting the underlying statute." *Kenney*, 96 F.3d at 1124. Thus, to prevail on its claim that its actions are not subject to judicial review, the Corps must demonstrate that neither the Flood Control Act nor any of its internal regulations provides law to apply in these cases. We reject this argument. We conclude that the Corps's actions are constrained both by the Flood Control Act and by the Master Manual.

The Flood Control Act clearly gives a good deal of discretion to the Corps in the management of the River. But this discretion is not unconstrained; the Act lays out purposes that the Corps is to consider in managing the River. The Act recognizes what the Supreme Court has called the dominant functions of the River's reservoir system – flood control and navigation. *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 512, 108 S.Ct. 805, 98 L.Ed.2d 898 (1988). While flood control and navigation are dominant functions, the Act also recognizes recreation and other interests and secondary uses that should be provided for. Flood Control Act Section 4, 58 Stat. at 889-90. The text of the Flood Control Act thus sets up a balance between flood control, navigation, recreation, and other interests. Because the Flood Control Act calls on the Corps to balance these various interests, the courts can review the Corps's decisions to ensure that it considered each of these interests before making a decision. What the text of the Act does not provide is a method of deciding whether the balance actually struck by the Corps in a given case is correct or not. Nevertheless, the Flood Control Act clearly

provides some law to apply, so the decisions of the Corps are subject to judicial review under the Act.

The minimal guidance provided by the Flood Control Act is only the beginning of our inquiry, however. We turn next to the Master Manual to decide whether it binds the Corps. The Corps has promulgated the Master Manual, which sets out priorities and directs the Corps to take certain actions in given situations. Upon close examination, we conclude that the Master Manual is binding on the Corps because it sets out substantive requirements, and its language and context indicate that it was intended to bind the Corps's discretion.

The Corps maintains that the Manual is not binding because it is not a rule, merely a policy statement. Indeed, the Master Manual was not promulgated through the notice-and-comment rulemaking procedures of the Administrative Procedure Act. This does not by itself render the Master Manual non-binding. Agency statements can be binding upon the agency absent notice-and-comment rulemaking in certain circumstances. Where a policy statement purports to create substantive requirements, it can be a legislative rule regardless of the agency's characterization. *Northwest National Bank v. United States Dep't of the Treasury*, 917 F.2d 1111, 1116-17 (8th Cir.1990); see also *Syncor Int'l Corp. v. Shalala*, 127 F.3d 90, 94 (D.C.Cir.1997) (holding that policy statements can become binding on the agency if so intended, which is a determination made by examining the statement's language and context).

The language of the Master Manual itself implies that it is binding. Throughout, the Manual speaks of what "is" done or "will" be done. Section 9-3 of the Manual, for

example, explains that the "general approach, which was developed and generally agreed upon during planning and design of the reservoirs, *is observed* in operation planning and subsequent reservoir regulation procedures." Master Manual Section 9-3 (emphasis added). This general approach prioritizes the different interests that will be considered in regulating the reservoirs. The interests are to be provided for in this order: flood control, irrigation and upstream beneficial uses, downstream water supply, navigation and power, power generation, and finally recreation and wildlife. In the midst of this prioritization, the Master Manual speaks in mandatory terms. Focusing on the areas of most interest to this case, the fourth priority section reads: "the remaining water supply available *will be regulated* in such a manner that the outflow from the reservoir system at Gavins Point provides for equitable service to navigation and power." *Id.* (emphasis added). Two paragraphs later, the Manual indicates that recreation, fish, and wildlife will be provided for insofar as possible, but consistently with the preceding considerations (including navigation). Section 9-3 itself seems to indicate that the Manual was intended to bind the Corps, and later provisions bolster this conclusion.

In addition to sections, like Section 9-3, which explain general priorities and goals, the Master Manual also includes provisions that direct the Corps to take certain actions when given circumstances occur. In Section 9-19, for example, the Manual provides that "Fall extensions of the navigation season beyond the normal 8-month length will be scheduled" when certain triggering events occur. Other provisions require the Corps to maintain minimum flow levels at various points on the River at different times. See generally Master Manual Section 9. These

provisions can hardly be termed non-binding; they, like Section 9-3, speak of what the Corps will do in given circumstances. The Manual's provisions, then, do not merely give advice to administrators; instead, they direct the operation of the River. There is no indication in the text of the Manual that the Corps is free to ignore its provisions if it so chooses. Indeed, the language of the Manual appears to assume that members of the Corps must follow its provisions.[4]

In addition to the Master Manual itself, the Corps's promulgated regulations indicate that the Manual is binding. The Code of Federal Regulations includes a section that "prescribes policies and procedures to be followed by the U.S. Army Corps of Engineers in carrying out water control management activities, including establishment of water control plans for Corps and non-Corps projects as required by Federal laws and directives." 33 C.F.R. § 222.5 (2002). The regulation goes on to require the Corps to develop water control plans "to conform with objectives and specific provisions of authorizing legislation and applicable Corps of Engineers reports," and indicates that "[t]horough analysis and testing studies will be made as necessary to establish the optimum water control plans possible within prevailing constraints." *Id.* § 222.5(f). "[P]lans developed for specific projects and reservoir systems will be clearly documented in appropriate water

[4] The Master Manual contains various other provisions that bolster this conclusion, including a provision that the Manual may be revised when necessary. Master Manual Section I. If the Manual were non-binding, there would be little need to include a provision allowing for revision; the Corps could simply ignore the Manual entirely.

control manuals." *Id.* The regulation also recognizes the need to create a "Master Manual" in cases where several projects are linked together. *Id.* § 222.5(i)(2). These manuals are to be created with the aid of public involvement. *Id.* § 222.5(g)(2). And once produced, these plans are to be made publicly available. *Id.* § 222.5(g)(2)(ii). These provisions support the conclusion that the Manual binds the Corps. The most significant of these provisions is the indication that in creating Master Manuals, the Corps will consider public comment on its plans and then publicize the completed plans. The public-comment provision recognizes the power that these Manuals wield – a power that should be exercised only after public consideration. The provision which makes these manuals publicly available likewise recognizes that these manuals will affect individuals, and that potentially affected people should have access to the documents. These are not the types of procedures one would expect in the promulgation of an internal, non-binding agency guideline.

Moreover, the Corps's treatment of the Manual indicates that it is binding. Lawrence Cieslak, a member of the Corps, indicated in his testimony to the South Dakota District Court that all of the critical decisions that were made in the Spring of 2002 were based upon the instructions in the Master Manual. The Corps decided the length of the navigation season and decided not to cut the releases from the reservoirs because the Master Manual instructed as much. Moreover, Mr. Cieslak concluded his testimony by observing that "we have stated that we will continue to try to meet the operational objectives of the current Master Manual," until a revised manual is completed. Appendix at 792. As this testimony demonstrates, the Corps continues to treat the Master Manual as a how-to

manual for operating the Missouri River. The Corps has treated and continues to treat the Master Manual as a constraint on its discretion in operating the River.

Because the language and context of the Master Manual and the Corps's treatment of the manual indicate that it binds the Corps, we conclude that it is binding. The Corps is not free to ignore the Master Manual (though it may elaborate upon details of operation in its annual operating plans), and courts can review the Corps's actions to ensure conformity. In the end, then, there is sufficient law to apply in these cases. In each case, courts can assess whether the Corps's actions run afoul of either the Flood Control Act or the Master Manual.

B. South Dakota

We turn our attention first to the injunction entered by the South Dakota District Court. The Court enjoined the Corps from releasing water from either Lake Oahe or Lake Francis Case. The State of South Dakota claimed that it was entitled to this relief on three grounds. First, it alleged that the Flood Control Act requires the Corps to act so as to maximize all interests on the River, including recreation. Second, the State argues that it is entitled to relief because the Corps is judicially estopped to favor navigation over recreation. Finally, South Dakota maintains that the Corps acted arbitrarily and capriciously in favoring navigation over recreation. We hold that none of these arguments is likely to succeed on the merits.

South Dakota argues that the Flood Control Act requires the Corps to maximize the benefits of the River, including fish-and-wildlife benefits.[5] This argument is not based upon the text of the statute, but instead upon the Act's legislative history. Senate Document 247 states that the plan "will secure the maximum benefits for flood control, irrigation, navigation, power, domestic and sanitary purposes, wildlife, and recreation." S. Doc. No. 247, at 5; see also H.R. Doc. No. 475, at 29 ("the comprehensive plan would . . . provide for the most efficient utilization of the waters of the Missouri River Basin for all purposes, including irrigation, navigation, power, domestic and sanitary purposes, wildlife, and recreation."); *id.* at 3 ("When completed the basin plan will be operated for maximum multiple purpose use."). Moreover, Senate Document 191, which represented one of the original competing views, included a provision that stated that "during the spawning season every effort will be made to maintain as constant a pool level as possible." S. Doc. No. 191, 78th Cong., 2d Sess. 211 (1944). South Dakota maintains that the sum total of this legislative history compels the Corps to balance the interests each year so as to maximize each category of benefits, and that courts can review the annual operating plans to ensure that they do indeed maximize the benefits.

We reject this argument. South Dakota's proffered standard – whether the Corps's management of the River maximizes the benefits to all interests – is not the kind of standard that courts regularly employ in reviewing agency

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[5] South Dakota does not argue that the Corps's decision to release water from Lake Oahe was contrary to the Master Manual.

action. As a general rule, courts defer to agency policy decisions because it is not a court's "function to substitute [its] judgment for that of the agency." Aman & Mayton, Administrative Law § 13.10.2 (1993). Under South Dakota's proffered standard the Corps's actions would receive no deference and the courts could be called upon to review every decision that the Corps makes, no matter how minute. Although Congress could give the courts the power to engage in such searching review, we do not believe that the portions of the Flood Control Act's legislative history to which South Dakota directs this Court are sufficient to achieve such a radical shift from the normal standard of review. Indeed, the statements that South Dakota points to are merely general statements of policy goals. They are not phrased as limitations on the Corps's discretion. Given that this argument finds no support in the text of the statute, and given the vagueness of the legislative history on the matter, we refuse to apply South Dakota's proffered standard. Courts are simply not empowered to review every decision of the Corps to ensure that it maximizes the benefits of the River for all interests. Indeed, such a standard would be impossible to meet, anyway. In times of drought it is not possible for both navigation and fishery benefits to be maximized. Something has to give.

South Dakota next argues that judicial estoppel requires the Corps to give equal consideration to recreation and other interests including navigation. This argument is based upon an agreement reached in previous litigation in Montana. There, South Dakota maintains, the Corps agreed to give all interests, including recreation, equal consideration in the management of the River – as opposed to giving flood control, navigation, or other interests priority

over recreation – until the revision of the Master Manual was complete. Even assuming that the elements of judicial estoppel were met in this case,[6] the only thing that the Corps agreed to was that it would give all interests equal consideration. S.D. Brief at 27 (citing the ruling in a previous suit that gave rise to the judicial estoppel claim). Equal consideration does not mean equal results. In this case, South Dakota has presented no evidence that the Corps did not give equal consideration to recreation; only that in the end, the Corps decided to lower one reservoir per year during a drought to maintain navigation. This result could easily arise from the Corps's giving equal consideration to each interest. Indeed, the Corps maintains that it considered the interests of recreation equally. Testimony of Lawrence Cieslak, App. at 823 ("[I]n the Annual Operating Plan we are giving equal consideration to all of the project purposes in trying to meet the operation objectives.") The Corps concluded that it does not need to hold the water level at every reservoir constant every year to allow recreational activities to flourish. The evidence before the Corps indicated that a good fish spawn once every four to five years is sufficient to maintain the fisheries of each reservoir. Master Manual Section 9-31. According to this conclusion, then, the Corps can lower each reservoir on a rotating basis (one per year) and still maintain the fish stock in the reservoirs. Given this fact, the Corps's decision to lower one reservoir per year during a drought simply does not provide any proof that the

[6] Because we rule that there is no evidence that the Corps failed to give equal consideration to recreation, we do not reach the question of whether the elements of judicial estoppel were met in this case.

Corps was not giving recreation equal consideration. South Dakota is unlikely to succeed on its judicial-estoppel theory.

Finally, we must consider whether the Corps's decision to lower Lake Oahe in the Spring of 2002 to maintain downstream navigation was arbitrary and capricious. See 5 U.S.C. § 706(2)(A). "To make this finding the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency." *Overton Park*, 401 U.S. at 416, 91 S.Ct. 814 (citations omitted). To pass scrutiny, "[t]he agency must articulate a rational connection between the facts found and the choice made." *Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 288, 95 S.Ct. 438, 42 L.Ed.2d 447 (1974) (internal quotations omitted). This standard of review gives great deference to the policy decisions made by the agency and does not allow a court to overturn an agency action merely because the court would have acted differently; a court may find an action to be arbitrary and capricious only when there is no rational basis for the policy choice.

The policy choice that South Dakota is challenging is not arbitrary and capricious. The Corps provided a rational basis for its decision to lower one reservoir per year during drought conditions. The Corps had evidence that every reservoir did not need to have a good spawn each year to maintain the fish stocks. Thus, so long as each reservoir's water level was not lowered every year, the fish stocks in the reservoirs would not be irreparably harmed.

The Corps decided to alternate the harm among the reservoirs, maintaining the water level at all but one reservoir each year. This plan would presumably allow each reservoir to have a fruitful spawn five out of every six years even in the worst drought conditions. This plan was eminently rational. South Dakota's efforts to increase the rainbow smelt stock during the Spring of 2002 do not make the plan irrational. South Dakota knew that Lake Oahe's water level had not been lowered in 2001, and that it was thus among the candidates to be lowered in 2002. Moreover, if Lake Oahe had been lowered as planned in 2002, it presumably would not be lowered in 2003, which would allow for a fruitful spawn this year. The Corps's policy was not irrational when written and did not become irrational in the Spring of 2002 because of South Dakota's efforts on Lake Oahe. South Dakota, therefore, is not likely to succeed on its theory that the Corps acted arbitrarily and capriciously.

Because none of South Dakota's theories for relief is likely to succeed on the merits, it was not entitled to a preliminary injunction. We therefore reverse the preliminary injunction entered in the South Dakota District Court and remand the case to that Court for further proceedings consistent with this opinion.

C. North Dakota

The arguments raised by North Dakota in favor of affirming the injunction entered in the North Dakota District Court are quite similar to those made by South Dakota. Having already rejected South Dakota's judicial-estoppel theory and its argument that the Corps's policy to release water from one reservoir per year is arbitrary and

capricious, we need not address these arguments again. In addition, North Dakota argues that the Flood Control Act itself precludes the Corps from favoring navigation over recreation. This argument is simply incorrect; the Flood Control Act does not require the Corps to give equal treatment to recreation. The Flood Control Act provides little guidance about what priority the Corps can or must give to different interests. The evidence that we do have, including the sequential listing of interests that uniformly lists navigation before recreation, indicates that the Corps's primary concerns should be flood control and navigation. The Supreme Court appears to have accepted as much. *ETSI,* 484 U.S. at 512, 108 S.Ct. 805. The Corps has adopted this prioritization, as evidenced by the listing of interests in Section 9-3 of the Master Manual. The Corps's decision to adopt this prioritization was not impermissible.

Because, like South Dakota, North Dakota has not demonstrated that it is likely to succeed on the merits, the North Dakota District Court erred in entering a preliminary injunction in its favor. We therefore reverse the preliminary injunction and remand this case to the District Court for further proceedings consistent with this opinion.

D. Nebraska

The preliminary injunction entered in the Nebraska District Court was wholly different from those entered in North Dakota and South Dakota. The Nebraska District Court ordered the Corps to abide by the Master Manual because it concluded that the Manual binds the Corps. We can find no error with this conclusion. The Master Manual

does bind the Corps, and under 5 U.S.C. § 706, Nebraska was entitled to an order that the Corps abide by its own formally adopted policies.

The Corps argues strenuously against the preliminary injunction entered in Nebraska. It feels that it should not be bound by the Manual when unforeseen circumstances arise. The record before this Court does not allow us to assess the validity of this argument on this appeal. Probably the Corps should be accorded some flexibility if an unforeseen circumstance arises. We leave such questions to the District Court to decide on remand if necessary. The Nebraska District Court order granting a preliminary injunction is affirmed, and the stay entered by this Court is vacated. This case is remanded to the District Court for proceedings consistent with this opinion.

IV.

In summary, we conclude that the South Dakota District Court erred in denying the motions to intervene and in entering a preliminary injunction requiring the Corps to maintain the water level at Lakes Oahe and Francis Case. The Court's orders are, therefore, reversed, and the case is remanded for proceedings consistent with this opinion.

We likewise conclude that the North Dakota District Court erred in enjoining the Corps from releasing water from Lake Sakakawea. That Court's order is, therefore, reversed, and the case is remanded for proceedings consistent with this opinion.

Finally, we conclude that the Nebraska District Court did not err in entering a preliminary injunction requiring

the Corps to follow the Master Manual. That Court's order is, therefore, affirmed, and the case remanded for proceedings consistent with this opinion.

The motion for an expanded stay is denied as moot.

It is so ordered.

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

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STATE OF SOUTH DAKOTA, and WILLIAM J. JANKLOW, GOVERNOR, Plaintiffs, -vs- LT. COLONEL KURT F. UBBELOHDE, DISTRICT ENGINEER, OMAHA DISTRICT, UNITED STATES ARMY CORPS OF ENGINEERS, and GENERAL DAVID A. FASTABEND, COMMANDER, NW DIVISION, PORTLAND, OREGON, Defendants.	*	CIV 02-3011 TEMPORARY RESTRAINING ORDER (Filed May 2, 2002)

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The State of South Dakota and its current Governor, William J. Janklow (collectively "the State"), instituted this action pursuant to Fed.R.Civ.P. 65 against the United States Army Corps of Engineers ("the Corps"), to prevent the continued, planned release of additional water out of Lake Oahe, effectively lowering Lake Oahe by several feet. The State argues that if Lake Oahe is lowered as planned, the State will suffer irreparable injury. This alleged irreparable injury is the loss of literally millions of rainbow smelt which serve as the primary food source for walleye, a popular sport fish. Lake Oahe is nationally known for its excellent walleye production and concominent [sic]

sport fishing. That national recognition pays big dividends to the State's treasury as well as to the local communities and businesses along Lake Oahe and highways leading to it. The State argues that if the Corps is permitted to lower the level of Lake Oahe, the State will lose many millions of dollars due to the devastating impact the loss of the smelt would have on the walleye fishing industry. After careful consideration of the materials submitted by the parties and the arguments made at the May 1, 2002 hearing, the court concludes that the Corps should be restrained as detailed below.

BACKGROUND

This case is the newest installment in an on-going, epic struggle between the Corps and the upper basin states of Montana, North Dakota, and South Dakota over the use of the Missouri River. The river is vital to the economies of the upper basis states as it is to the lower basin states of Iowa, Nebraska, Kansas, and Missouri. An important difference separating the lower basin states from the upper basin states is the use of the Missouri River by the lower basin states as a means of navigation. From Sioux City, Iowa, to St. Louis, Missouri, barges use the river to transport various items and commodities. It is undisputed that no barge traffic exists in the upper basin states. The upper basin states primarily use the river for hydroelectric power, irrigation, domestic water use, and recreational activities.

The Corps operates six dams and reservoirs located on the Missouri River in the upper basin pursuant to the Flood Control Act of December 22, 1944, 58 Stat. 887. Governing or guiding the Corps' operation of those dams

and reservoirs is the Master Manual which was last updated and adopted in 1979. It is that Master Manual which, at least in part, serves to fuel the on-going controversy between the parties. In the 1979 Master Manual, the Corps listed, in order of importance, the priorities it set out to achieve in this operation and regulation of the dams and reservoirs. Navigation was ranked fourth, with recreation, fish, and wildlife ranked sixth. In ranking them sixth, the Corps stated that, "insofar as possible without serious interference with the foregoing functions, the reservoirs will be operated for maximum benefit to recreation, fish, and wildlife." 1979 Master Manual, p. IX-1.

In other words, recreation, fish, and wildlife are subservient to and dependent for their existence on not seriously interfering with the five previous rankings of use. The upper basin states have repeatedly accused the Corps of subordinating their interests in maintaining and promoting their recreation industries to the interests of navigation. To put it rather bluntly, the upper basin states strongly object to having river water flushed south, causing harmful effects to fishing industries, so that barges may operate hundreds of miles away. In sum, the upper basin states want the Corps to afford recreation, fish, and wildlife a higher priority than they currently receive.

In 1989, the Corps announced it was going to overhaul its Master Manual. This process has been amazingly slow, being tied up in bureaucratic and political quagmires. Despite its announcement over a decade ago, the Corps

has not yet successfully revised the Master Manual.[1] In the interim, the Corps has relied on the 1979 Master Manual to guide its Missouri River operations.

In early and mid-1900's, walleye fishing and the revenue it raised significantly increased in South Dakota. This increase was largely due to the outstanding success of Lake Oahe as a nationally recognized trophy walleye fishery. From April to October of 1991 through 1998, an average of 265,743 angler trips were made to Lake Oahe every year. This fishing boon produced an average economic impact of approximately $20 million per year. Fishermen and women came to Lake Oahe because of the real possibility of catching a trophy walleye, that is, one weighing over eight pounds. During the summer months of 1993 to 1998, the average walleye harvested from Lake Oahe was larger than 17 inches. In sum, during the mid-1990's, Lake Oahe was a major revenue raiser for South Dakota and the communities which lie near it or on the route of travel. That continued revenue was dependent upon continued successful walleye fishing.

In 1997, walleye fishing on Lake Oahe began to suffer. A major contributing factor of that downturn was the Corps' decision in the spring of 1997 to release water through the Oahe Dam. In doing this, the Corps flushed almost a half a billion smelt through the Oahe Dam's turbines. The loss of so much smelt significantly altered the balance between predator and prey in Lake Oahe. Because its primary food source was lacking, the walleye

[1] In its submissions to the court in this case, the Corps claims that it is aiming to release its revised Master Manual in 2003.

population suffered. As one researcher observed, following the 1997 smelt crash, Lake Oahe became full of hungry, stunted walleyes in poor condition. As news of the crash and resulting poor walleye condition spread, anglers, not surprisingly, stayed away. In 2000, angler trips fell to a low of 109,665, approximately 156,078 fewer trips than was experienced, on average, between 1993 and 1998. The loss of so many anglers devastated the fishing economy as to Lake Oahe. Only $8.2 million dollars in revenue was generated in 2000, compared to the yearly average of nearly $20 million between 1991 and 1998. Thus, the smelt crash of 1997 produced a very real, tangible economic loss to South Dakota.

The State, in an effort to turn Lake Oahe walleye fishing around, implemented a bold management plan in 2001. The primary goal of the plan was to reestablish the balance between predator and prey in Lake Oahe. The State understood that future walleye fishing success hinged on temporarily lowering the number of walleyes in Lake Oahe. Walleye numbers had to be reduced to give the smelt an opportunity to rebound from the 1997 disaster. To accomplish this, the State greatly increased its walleye limits on Lake Oahe. It raised the limit from eight walleyes for two days of fishing to forty-two for three days of fishing.

Biologists for the State had reason for optimism earlier this spring. Their tests indicated that the balance between predator and prey in Lake Oahe had a real chance of recovery this year. Tests signaled that this year's smelt production would be high. This is due, in large part, to the natural smelt cycle that is beyond human control. It was also due, the State contends, to its bold management decision last year to dramatically increase

the walleye limits on Lake Oahe. Thus, the State had reason to hope that a successful smelt spawning season this year could reverse the last few years' poor walleye fishing seasons.

After collecting the data signaling a strong smelt spawn, biologists for the State sent this information to the Corps along with a request to maintain water levels on Lake Oahe between April 8 and May 22, 2002. Water levels play a crucial role in the success of the smelt spawn. Rainbow smelt lay their eggs in very shallow water along the shores of Lake Oahe. Generally, the eggs are laid in water no deeper than six inches with many of the eggs being laid in water no deeper than a quarter of an inch. If the eggs are exposed to air, they dry out and die rather quickly. Thus, lowering water levels on Lake Oahe after the eggs have been laid guarantees the smelt spawn will not survive. Despite this information, the Corps indicated that it planned to proceed with its earlier decision to continue to lower Lake Oahe by several feet. The Corps refused to maintain Lake Oahe's water levels between April 8 and May 22 as requested by the State. It is that decision which resulted in this litigation.

This litigation is not the first between the parties. In an action very similar to this one, the upper basin states sued the Corps in 1990 in federal court in North Dakota seeking an injunction prohibiting the Corps from releasing water from Lake Oahe in an effort to protect various sport and forage fish. The district court enjoined the Corps from releasing any additional water, but the United States Court of Appeals vacated the injunction without opinion. In a later decision, the Eighth Circuit vacated its prior decision and declined to reach the merits finding that the case had become moot and did not come within the exception

which allows a court to deal with an issue likely to reappear. *See State of South Dakota v. Hazen*, 914 F.2d 147 (8th Cir. 1990).

In 1991, the upper basin states again sued the Corps, this time in federal court in the District of Montana. The upper basin states argued that the Corps had improperly assigned downstream uses, i.e., navigation, a higher priority over recreation, fish and wildlife as a result of its alleged erroneous interpretation and the unlawful static priorities of the 1979 Master Manual. Because the Master Manual was allegedly set to be revised, the Corps, the State argues, mooted the lawsuit by agreeing to give all water uses equal consideration while the Master Manual was being reviewed. Thus, the case was dismissed.

Despite the Corps' assurances of equal use consideration in 1991, the State maintains that the Corps has not kept its word and misrepresented matters to the district court in Montana. The State contends that a temporary restraining order is necessary to keep the Corps from decimating the rainbow smelt population by continued water releases from Lake Oahe. The State argues that the extraordinary remedy of the temporary restraining order is necessary because, unless the Corps is immediately restrained from releasing water out of Lake Oahe, the rainbow smelt spawn will irreparably suffer, causing significant financial losses for South Dakota, both this year and in years to come. The immediacy of the State's request for a temporary restraining order is dictated by the fact that the smelt spawn has begun and will conclude around May 22. Unless this court restrains the Corps continued water releases, the State argues, the smelt spawn will be lost. There is no dispute about that.

DISCUSSION

In deciding whether to grant or deny a request for a temporary restraining order, the court is to consider the following four factors: (1) the threat of irreparable harm to the State; (2) the state of the balance between this harm and the injury that granting the injunction will inflict on other litigants; (3) the probability that the State will succeed on the merits; and (4) the public interest. *See Dataphase Systems, Inc. v. C.L. Systems, Inc.*, 640 F.2d 109, 113 (8th Cir. 1981). In reviewing such a request, the court is to adopt a flexible approach that will enable it to encompass the particular circumstances of the case. *Id.* In balancing the equities, no single factor listed above is determinative; rather, the court should employ a pragmatic approach, keeping in mind the relative injuries to the parties and the public. *Id.* If the movant has raised a substantial question and the equities are otherwise strongly in its favor, the showing of success on the merits can be less. *Id.*

The threat of irreparable harm to the State is real. As detailed above, the State's revenue from walleye-related fishing on Lake Oahe has decreased from nearly $20 million in 1996 to just over $8 million in 2000. A primary cause of that decrease was the disastrous results to the smelt spawn of 1997 when almost half a billion smelt were flushed out of Lake Oahe. The net result was that fishermen stayed away and the State lost revenue. If this year's smelt spawn is similarly decimated, the State stands to lose millions of dollars, as do the many communities and businesses who rely on Lake Oahe walleye fishing for their economic livelihood.

The court, in considering the irreparable harm to the State, is mindful of the undisputed evidence that this year has the likely potential to be very positive from a smelt production standpoint, This is due, in part, to the natural cycles of smelt production as well as the efforts taken by the state to lower the number of walleye in Lake Oahe in an attempt to halt the smelt population recover. Thus, if this year's smelt population is decimated, the combination of the State's efforts and the fortuitous turns of this year's advantageous smelt cycle will be lost. Thus, the State not only stands to lose several millions of dollars this year, but stands to lose millions more in the years to come.

The Corps will not suffer any harm if the court orders a temporary restraining order. As a regulatory entity, it stands to lose nothing.[2] All it would be required to do is maintain water levels on Lake Oahe for a short period of time pending the hearing on the application for a preliminary injunction which hearing will begin on Thursday, May 9, five working days from today. Given the capabilities of the Corps, it would be able to adhere to the court's order quickly and without serious disruption to its operations.[3] Thus, this factor, when weighed with the harm that

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[2] In its submissions to the court, the Corps included several affidavits from those associated with the barge industry, warehouse industry, docking industry, and other navigation related industries. None of those entities are parties to this action. Thus, any harm that the court's temporary restraining order could cause them is more correctly considered under the public interest factor.

[3] The court has no interest to run the Corps or tell it how to operate. All it is enjoined from doing is lowering Lake Oahe. How it accomplishes that, i.e., releasing more water from other reservoirs or reducing the amount of water going south from Sioux City, is not before the court today.

the State would suffer, counsels in favor of the temporary restraining order.

The likelihood that the State will succeed on the merits is sufficient given the amount the State would lose if the temporary restraining order is not granted. As the Eighth Circuit stated in *Dataphase*, the showing of success on the merits may be less if the other factors weigh heavily in favor of the injunction. *Id.* Here, the State advances two arguments on the merits. First, the State argues that the doctrine of judicial estoppel applies in this case, prohibiting the Corps from not honoring its assurances in the 1991 Montana litigation that it would consider all water uses equally. The State makes a convincing preliminary argument that the Corps, in deciding to let millions of smelt die, is arbitrarily and capriciously favoring navigation over recreation, fish and wildlife. This is especially true given the State's request that the water level on Lake Oahe not be lowered for a very short time. The Corps' refusal to meet that request does raise an issue of whether it is favoring navigation over recreation, fish and wildlife. If it is, the doctrine of judicial estoppel may apply. Thus, on this issue, the State has made a sufficient showing. It raises a substantial question, at least at this early junction, one that could well be resolved in its favor.

Additionally, the State argues that the Corps' decision to cause the death of millions of smelt, effectively ruining the State's Lake Oahe walleye production, in favor of downstream navigation is an unreasonable and arbitrary decision under the administrative Procedures Act, 5 U.S.C. § 706. The State argues that the Corps' interpretation of the Master Manual is erroneous and that its refusal to consider the dramatic shifts in both navigation and recreation, fish and wildlife is arbitrary and capricious.

Again, the State has made a sufficient showing at this early stage of the proceedings. Of particular importance is the following language from the 1979 Master Manual: "insofar as possible without serious interference with the foregoing functions, the reservoirs will be operated for maximum benefit to recreation, fish and wildlife." The court concludes at this early juncture that serious questions surround both whether "serious interference" would be caused by maintaining Lake Oahe's current level for a very short period and whether the Corps' decision gives the "maximum benefit" to recreation, fish and wildlife, especially in light of the evidence of a declining barge industry and a greatly expanding recreation, fish and wildlife industry. Thus, for purposes of the temporary restraining order, the court concludes that the State has sufficiently demonstrated its likely success on the merits. Given the size of the harm facing the State, the court concludes that the water level should be maintained pending a hearing on the preliminary injunction request.[4]

Given the extensive consideration to the merit's issue by both parties and to the incredible interest expressed in it as well by various states, interest groups, and others who tried to participate as either amicus or as intervenors, the court feels compelled to state that this determination is preliminary only. The court, in addressing the merits issue for purposes of the temporary restraining order, was

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[4] The Corps argues at length that the State cannot succeed on the merits. In focusing so intently on the merits, however, the Corps overlooks the fact that if the movant has raised a substantial question and the equities are otherwise strongly in its favor, the showing of success on the merits can be less. *See Dataphase*, 640 F.2d at 113. The other factors weigh heavily in favor of the State in this case.

required to "peek under the tent" and see if enough was there warranting the extraordinary remedy of the temporary restraining order. Because the other factors weigh heavily in favor of the State, the court concludes that enough is there on the merits to support a temporary restraining order. Whether the State will ultimately prevail on the merits is a decision for another day. Nothing in the temporary restraining order analysis requires sure success on the merits. At this early stage, the court finds that the State has demonstrated enough to justify the temporary restraining order.

The final consideration is the public interest. As with beauty, the public interest is in the eye of the beholder. For the thousands of people who depend on the fishing industry in Lake Oahe, the public interest is obvious. Similarly, for the barge owners and others downstream, the public interest is equally obvious. There is only a finite amount of Missouri river water. The southern basin states want more of it; the northern basin states want more of it. Each wants it for their own legitimate reasons. Despite such obvious tension, the court concludes that the public interest would be best served in this case by granting the temporary restraining order. Barge traffic could be impacted, if at all, for one week at this point. However, there has been no significant impact thus far and no evidence that there will be any. The State, however, would be negatively impacted for years to come. The time component necessarily resolves the public interest factor in favor of the State. Under the circumstances, equity commands that those downstream possibly wait a short period rather than have those upstream financially devastated for years to come. Thus, this factor also weighs in favor of the temporary restraining order.

The court is not unmindful of the many affidavits submitted by the Corps from those dependent upon the barge industry and other water users. The temporary restraining order may or may not impact their operations. It must be remembered that nothing in the court's order requires the Corps to "turn off the water" flowing south. The Corps is only temporarily restrained as to lowering Lake Oahe. If the Corps desires to draw down other reservoirs, it is free to do so. Thus, the economic horrors detailed in those affidavits may well never come to pass. However, if the smelt spawn is decimated, the horrors articulated by the State will surely occur. Thus, this fact supports the court's determination that the public interest would best be served by issuing the temporary restraining order.

Fed.R.Civ.P. 65(c) requires the court to consider whether security shall issue and, if so, in what amount. Although Rule 65(c) allows the district court much discretion in setting a bond, the district court is required to make the necessary findings in support of its determinations. *See Hill v. Xyquad, Inc.*, 939 F.2d 627, 632 (8th Cir. 1991), citing *Rathmann Group v. Tanenbaum*, 889 F.2d 787, 789 (8th Cir. 1989). In this case, the court finds that a bond would serve no useful purpose. The Corps has not articulated any losses it would suffer if the court prevents it from lowering the water level of Lake Oahe. How the defendants choose to maintain the current water level (whether by stopping releases from the Oahe Dam or compensating for those releases from other dams) is at present their affair.

ORDER

Based on the foregoing

IT IS ORDERED that the defendants and each of them are temporarily restrained from reducing the water level of the Oahe Reservoir below the level which the defendants have voluntarily maintained since April 27, 2002, until either further Order of the court or May 11, 2002, whichever first occurs.

Dated this 2nd day of May, 2002.

BY THE COURT:

/s/ Charles B. Kornmann
CHARLES B. KORNMANN
United States District Judge

ATTEST:
JOSEPH HAAS, CLERK

BY: /s/ Barbara J Pinkerton
DEPUTY
(SEAL)

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

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STATE OF SOUTH DAKOTA, and WILLIAM J. JANKLOW, GOVERNOR,	*	CIV 02-3011
Plaintiffs,	*	PRELIMINARY INJUNCTION
-vs-	*	
LT. COLONEL KURT F. UBBELOHDE, DISTRICT ENGINEER, OMAHA DISTRICT, UNITED STATES ARMY CORPS OF ENGINEERS, and GENERAL DAVID A. FASTABEND, COMMANDER, NW DIVISION, PORTLAND, OREGON	*	(Filed May 14, 2002)
Defendants.	*	

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On April 25, 2002, the State of South Dakota and its current Governor, William J. Janklow (collectively "the State"), initiated this action seeking a temporary restraining order, preliminary injunctive relief, declaratory relief, and a permanent injunction prohibiting the defendants (collectively "the Corps") from continuing to lower the water level on Lake Oahe in South and North Dakota during the rainbow smelt spawn. This is an extraordinary year of production for smelt, the smelt population having been greatly reduced in recent years, thus starving the walleye population, largely caused by great flushes of water by the defendants, causing the smelt to go through the turbines at Oahe Dam. Walleye, a popular sport fish, primarily feed on rainbow smelt in Lake Oahe. The State

alleged that if Lake Oahe's water level continued to drop as a result of releases by the Corps, the smelt spawn would be decimated, thereby causing irreparable harm to the walleye population in Lake Oahe, and, in turn, causing irreparable economic injury to the State and the various businesses on and around Lake Oahe that are dependent upon Lake Oahe's fishing industry and the annual revenues. Hundreds of other business enterprises "on the way to Oahe" also depend greatly on tourists intent on going fishing at probably the greatest Walleye fishery in the United States. The economic impact to South Dakota from the Missouri River fishing industry runs to up to $51 million per year. There are approximately 100 boat ramps and 67 recreation areas now maintained by the State on the Missouri River in South Dakota. All these allegations are uncontested.

On the same day, April 25, 2002, the court had an informal telephonic conference with representatives of the Corps and the State. During that conference, the Corps agreed to voluntarily maintain Lake Oahe's water level pending a hearing that was then scheduled for May 1, 2002. The Corps, true to their word, succeeded in maintaining Lake Oahe's water levels. However, instead of decreasing the water flow out of Gavin's Point Dam, the Corps immediately began to draw down Lake Francis Case, a Missouri River reservoir in South Dakota just south of Lake Oahe and north of Gavin's Point Dam, also in South Dakota. The daily draw down on Lake Francis Case became and continues to be very significant, namely at an average rate of four to five inches per day. Releases of water from Lake Francis Case, since April 26, 2002, have been of such quantity as to discharge 2,000 cubic feet per second (CFS) above even what the Corps argues is the

minimum needed for downstream navigation, beginning at Sioux City, Iowa. No explanation was provided why the Corps would discharge such quantities of water. The walleye spawn was in progress on Lake Francis Case. Such significant and rapid draw downs have caused great damage and harm to the walleye spawn on Lake Francis Case. Again, all of these facts are undisputed.

The State responded to the draw down of Lake Francis Case with an amended complaint filed on April 30, 2002, the day before the scheduled hearing on the temporary restraining order request for Lake Oahe. The State contended that the Corps' decision to draw down Lake Francis Case, causing the decimation of the walleye spawn, while providing more than ample water for downstream navigation, was further evidence that the Corps arbitrarily and capriciously favored navigation interests over recreation, fish, and wildlife. It is the alleged unlawful, rigid, and never varying favoring of downstream navigation and perhaps other downstream wants or needs over upstream recreation, fish, and wildlife interests that serves to fuel the underlying dispute between the parties. The State attempted to expand the scope of the May 1, 2002, hearing to include Lake Francis Case. The court declined to do so, limiting the issues solely to Lake Oahe, concluding it would be unfair to the Corps to so broaden the hearing with such short notice. On May 2, 2002, the court issued an Order temporarily restraining the Corps from lowering the water level on Lake Oahe. The court then scheduled a preliminary injunction hearing for May 9, 2002, to consider whether the Corps should be preliminarily enjoined from lowering Lake Oahe and whether Lake Francis Case's water level should be similarly maintained. On May 9 and 10, 2002, a rather extensive

evidentiary hearing was held on the preliminary injunction requests. After listening to the evidence, reading the exhibits, considering the affidavits, the briefs, and the applicable law, the court concludes that the Corps should be preliminarily enjoined as detailed below.

DISCUSSION

The legal framework for determining whether to grant a preliminary injunction parallels the analysis used by the court in issuing its temporary restraining order. That framework consists of the following four factors: (1) the threat of irreparable harm to the State; (2) the state of the balance between this harm and the injury that granting the injunction will inflict on other litigants; (3) the probability that the State will succeed on the merits; and (4) the public interest. *See Dataphase Systems, Inc. v. C.L. Systems, Inc.*, 640 F.2d 109, 113 (8th Cir. 1981). In reviewing a request for a preliminary injunction, the court is to adopt a flexible approach that will enable it to encompass the particular circumstances of the case. *Id.* In balancing the equities, no single factor listed above is determinative; rather, the court should employ a pragmatic approach, keeping in mind the relative injuries to the parties and the public. *Id.* If the movant has raised a substantial question and the equities are otherwise strongly in its favor, the showing of success on the merits may be less. *Id.*

A. Lake Oahe

The four factors listed above weigh in favor of the preliminary injunction as to Lake Oahe. The court, in issuing the temporary restraining order, considered all of the above factors and concluded that preliminary relief

was warranted. Nothing has changed in the past week to detract from the court's conclusion that preliminary relief is clearly needed. In fact, as discussed below, recent rains in the past week, both in South Dakota and downstream, support the court's decision. Flood conditions in Missouri which have very recently occurred support less release of water to flow south. At Jefferson City, Missouri, c. 200,000 cubic feet per second (CFS) of water is passing. The court will preliminarily enjoin the Corps from further lowering the water level on Lake Oahe (the lake having been lowered substantially by the Corps prior to the filing of this lawsuit) until the smelt spawn and the walleye spawn have been completed, namely until close of business on May 25, 2002.[1] Expanded or additional factors supporting the relief as to Lake Oahe are discussed in the portion of this preliminary injunction dealing with Lake Francis Case.

B. Lake Francis Case

The walleye spawn that was threatened by the Corps' action of lowering Lake Francis Case was set to conclude on May 7, 2002. While that date has passed, causing a significant loss to the walleye spawn, thousands of walleye eggs still do exist and require an eighteen day incubation period. As the State's biologist made clear, if water levels are reduced during the incubation period, the eggs will dry out and die. Thus, while the walleye spawn on Lake Francis Case has concluded, the incubation period has just

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[1] For a more detailed analysis of the *Dataphase* factors and the facts of this case as they relate to Lake Oahe, please see the court's temporary restraining order, Doc. 38.

begun. If the radical draw down of Lake Francis Case continues, the walleye eggs that have survived will die, ensuring the total destruction of the 2002 walleye class. In addition, another popular sport fish, the small mouth bass, is set to now begin its spawn on Lake Francis Case. A continued draw down would doom that spawn, as well as the bait fish population necessary to support the walleye population.

While the fishing industry on Lake Francis Case is not as economically significant as it is on and around Lake Oahe, the destruction of the 2002 walleye class would have devastating effects on South Dakota and the businesses and communities dependent upon Lake Francis Case. While the effects of the destruction would not be immediately felt, they would be realized in approximately three to four years. The postponement of the harm, however, does not alter the court's conclusion that the destruction of this year's walleye class, baitfish class, and bass class would cost the State and Lake Francis Case's dependent communities millions of dollars. The economic value of the fishing industry as to Lake Francis Case is approximately $11.5 million annually. The harm, therefore, for purposes of the preliminary injunction, is real and substantial. It is not in any way speculative. It is also irreversable [sic]. A continued draw down of Lake Francis Case would devastate its fishery and the economic outlook for the businesses and communities that rely upon it. The Corps does not argue about the magnitude of the damages to South Dakota.

The other *Dataphase* factors governing the issuance of preliminary injunctive relief also favor the State. As previously discussed, the Corps will suffer no harm if preliminary injunctive relief is granted. In addition, because any preliminary injunctive relief would extend for

only two weeks, the public interest *Dataphase* factor rather easily resolves in favor of the State. While the court understands that requiring water levels to be maintained on both Lake Oahe and Lake Francis Case may reduce the water available for release from Gavin's Point Dam, the short time period involved significantly lessens any potential harm to downstream water users.[2] Since the issuance of the temporary restraining order, significant rainfall in downstream states, especially Missouri, has caused flood-like conditions, as already discussed. The Corps concedes that water is plentiful in the Missouri River channel from Kansas City to St. Louis. That stretch of the river, therefore, will be totally unaffected by any preliminary injunction. Moreover, a significant majority of the barges on the Missouri are south of Kansas City. There are currently no barges in transit that could possibly be affected. There are thirteen loaded barges that could conceivably be affected but they are all securely moored. If not properly moored, they can easily be better moored. Any reduced water flows, therefore, would produce a minimal impact when compared to the effects that the destruction of two upstream fisheries would produce. The court is also satisfied that maintaining Lake Oahe's and Lake Francis Case's current water levels for two weeks would not significantly adversely impact other downstream users of water. Especially important to the court and the public interest consideration are the many

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[2] The court is not forbidding the Corps from releasing water backed up by Gavin's Point Dam. The Corps is merely forbidden from lowering Lake Oahe and Lake Francis Case until close of business on May 25, 2002. How the Corps chooses to abide by the court's Order and otherwise operate the Missouri River system is its affair.

downstream municipalities that rely on the river for their drinking water. No significant impacts will be produced by a two week reduction in flows, if any such reduction occurs. Electric utility entities, especially those operating nuclear reactors, agree that no disruption in service would result from the court's very limited temporary restraining order. Any impact on downstream users would be minimal. Moreover, the court expressly offered the Corps the opportunity of reconvening in a few days if it desired to further attempt to make a credible showing of any credible and significant ills that the court's Order could cause downstream. The Corps declined that request, even after hearing from the court that the evidence at the hearing of danger to moored barges was speculative at best. Thus, the Corps' suggestion that some barges could be significantly damaged is speculative at best. No evidence was introduced to prove any such speculation. No expert witness was called to so testify, even though the court, as already noted, expressly issued such an invitation to the Corps. In any event, heavy recent rains and their run-offs producing full water level Missouri River tributaries combined with the fact that the Corps is only prohibited from lowering two reservoirs for two weeks, necessarily tips the public interest factor in favor of ordering preliminary injunctive relief. Some problems, including those with endangered species, can and should be mitigated or solved by the Corps without great economic significance, especially in comparison with the losses faced by South Dakota.

Finally, as the court previously determined, the State has made a sufficient showing of its likely success on the merits to warrant the issuance of a preliminary injunction. Both the judicial estoppel claim and the arbitrary and

capricious claim under the Administrative Procedures Act, 5 U.S.C. § 706, raise significant issues. In the judicial estoppel context, it is clear that the Corps has not changed its operation at all since the dismissal of the 1993 Montana litigation. It has continued to completely subordinate the upper basin interests in recreation, fish, and wildlife for the betterment of downstream navigation despite a federal judge's understanding (as set forth in the memorandum opinion) in the Montana litigation that all water uses were to thereafter receive equal consideration, making the case moot. Obviously, if the Corps told the judge in Montana its plans for equal water uses consideration, and did not fulfill those representations, the Corps would be obligated to act exactly as the judge was told. Otherwise, judicial estoppel may well apply. The court does not intend to permit any party, much less the federal government, to play fast and loose with the judicial process. Resolution of that issue, of course, will be determined at a later date. For purposes of preliminary relief, however, the State has made a sufficient showing of its likely success on the merits as it relates to judicial estoppel.

Additionally, the State has made a sufficient showing regarding its claim that the Corps' decision to destroy two upstream fisheries for the benefit of downstream navigation may well be arbitrary and capricious under the Administrative Procedures Act, 5 U.S.C. § 706. From what has been submitted to the court thus far, it is clear that the only goals being addressed are flood control and navigation. Recreation, fish, and wildlife interests are not now being addressed or logically considered. The court believes that this is largely due to the Corps' reliance on out-dated and inaccurate information to guide its operations. All parties concede that the Master Manual is and

has been for years in need of substantial revision. It was written and amended before the fishing industry in South Dakota had become so viable and economically important. It was striking to learn that it is the Corps' position that Lake Oahe would have to be reduced forty feet in depth before downstream navigation would be halted. The court cannot imagine the devastating economic and ecological impact such a significant reduction would produce. Despite that devastation, the declining and little used navigation industry would continue to enjoy business as usual.

Strongly supporting the State's arbitrary and capricious argument is the fact that navigation never has never been required to "take a hit" when water is in short supply. Whenever a water shortage occurs, it is the Corps' practice to require all or some of the upstream states of Montana, North Dakota, and South Dakota to "take the hit." The Corps has followed a consistent practice of permitting or causing the destruction of upstream fisheries, this despite the fact that the fisheries need only a few weeks to produce successful spawns. Despite the modest nature of the upstream states' request that water levels be maintained during that period, the Corps apparently refuses to abide or even properly consider such requests. Instead, navigation receives a full eight month season. Again, it is clear from the evidence that the Corps, in times of low water flows (as a result of drought or little snow melt or both), always chooses to seriously impact upstream states to continue navigation, "come Hell or low water." The more dire the water conditions upstream, the more water that is released for downstream purposes. There is no dispute about this being the Corps policy. It may well be arbitrary and capricious.

Requiring upstream fisheries to shoulder that burden is perhaps made all the more unreasonable in light of the expert testimony received by the court. An economics expert called by the State detailed in a very persuasive and detailed manner the rather meager, if any, economic impact downstream navigation produces. The economic impact of the upstream fisheries, however, continues to grow; Lake Oahe alone outpaces navigation's claimed contributions (and the court believes that these claims are highly overstated) almost three to one. Seven million dollars annually is claimed for navigation compared with Lake Oahe's annual twenty million dollars. The evidence presented was clear that barge traffic has consistently declined greatly, will continue to decline greatly, and is of little, if any, net economic value on the Missouri River. The State's expert effectively showed that the data and studies relied upon by the Corps are not credible and continue to be totally unrealistic as to barge traffic. Later water releases (during the course of the summer and fall) from the upstream dams would benefit barge traffic on the Mississippi River and would result in higher Western Area Power Administration electricity revenues.

The Corps' decision to adhere to navigation's sole interest in a full eight month season at the expense of the few weeks needed by upstream fisheries may well be arbitrary and capricious. Of course, a decision on that issue will come later. For purposes of the preliminary injunction request, the State's showing is easily sufficient.

The Corps gives no consideration to the fact that South Dakota gave up over 530,000 acres of the most productive and valuable farm land in the state to build the dams and flood the land, all of which was and is designed to protect downstream communities from flooding, i.e.

from loss of life and property. South Dakota has forever lost the tax revenue that those acres would have produced. In addition, the promised wide spread irrigation of the James River Valley in South Dakota, an idea that primarily drove the Pick-Sloan Plan, never materialized. While that may have been a blessing in disguise, it is further evidence that South Dakota has received rather little from the dams and has given up much. The primary benefits the dams produce in South Dakota are recreation, fish, and wildlife. Destruction of the fisheries would deprive South Dakota of the remaining benefit from having over a half million of its acres flooded and forever lost. The injunction should issue even without these facts.

It is clear that the State has standing to launch the challenge here. Iowa, Nebraska, and Missouri, in *State of Missouri v. Andrews*, 787 F.2d 270 (8th Cir. 1986), successfully challenged action by the Secretary of Interior and the State of South Dakota attempting to permit water to be moved from the Oahe reservoir to Wyoming for the purpose of a coal slurry pipeline. These states alleged that this action threatened "their right to obtain sufficient quantities of Missouri River water" for certain beneficial purposes and claimed that "the planned depletion would injure fish and wildlife habitats." *Id.* at 276. The district court in Nebraska found, *inter alia*, that the allegations of injury to fish, wildlife habitats, and sewage disposal stated a cause of action under the Fish and Wildlife Coordination Act, 16 U.S.C. §§ 661, 1531. *Id.* at 277. The lower court also held that the states had standing to invoke judicial review of the agencies' allegedly improper conduct under the Administrative Procedure Act, 5 U.S.C. § 701 (1982). *Id.* The Court of Appeals held: "We conclude that the states' allegations of injury to the beneficial uses of Missouri River

Basin water, and to the fish and wildlife habitats which this water supports, meet the injury-in-fact requirement. The appellants' argument that this injury is not fairly traceable to their actions, nor likely to be redressed by our decision today, is unpersuasive." *Id.* It was also noted that the decision by the Court of Appeals "does not address the issue of South Dakota's right, as against other states and the federal government, to allocate waters within its borders. This issue was not presented to us and South Dakota is not a party to this case." *Id.* (FN 5).

Another issue before the Court of Appeals in 1986 was the impact of Section Six of the Flood Control Act of 1944, 33 U.S.C. 708 (1982). This provides: "That the Secretary of War is authorized to make contracts with States, municipalities, private concerns, or individuals, at such prices and on such terms as he may deem reasonable, for domestic and industrial uses for surplus water that may be available at any reservoir under the control of the War Department: *Provided*, That no contracts for such water shall adversely affect then existing lawful uses of such water . . . " The appellants argued that the three States were not within the class of users whose interests are protected under Section Six. The answer was provided: "We do not think that this language must be read so narrowly. Section 6 of the Act evinces an intent to protect the interests of established users of Missouri River Basin water by ensuring that the Army considers their needs when determining whether there is *surplus water* available for industrial use. The states are current lawful users of Missouri River Basin water." *Id.* at 278 (emphasis supplied).

It is clear that there is, as to the upstream states, no "surplus water" available for industrial use at this stage of

2002. Questions of law and of fact remain to be resolved as to the implications of all of this. It is also clear that South Dakota is a current lawful user of Missouri River Basin water. It remains to be seen whether the rights of existing users have been preserved. It would appear, at this stage, that they have not been.

Fed.R.Civ.P. 65(c) requires the court to consider whether security shall issue and, if so, in what amount. Although Rule 65(c) allows the district court much discretion in setting a bond, the district court is required to make the necessary findings in support of its determinations. *See Hill v. Xyquad, Inc.*, 939 F.2d 627, 632 (8th Cir. 1991), citing *Rathmann Group v. Tanenbaum*, 889 F.2d 787, 789 (8th Cir. 1989). In this case, the court finds that a bond would serve no useful purpose. The Corps has not articulated any losses it would suffer if the court enters the preliminary injunction. How the defendants choose to maintain the current water level (whether by reducing releases from the Gavin's Point Dam or compensating for those releases from other dams) is at present their affair.

ORDER

Based on the foregoing,

IT IS ORDERED

(1) That the defendants and each of them are preliminarily enjoined from reducing the water level of the Oahe Reservoir below the level which the defendants have voluntarily maintained since April 27, 2002, until either further Order of the court or close of business on May 25, 2002, whichever first occurs.

(2) That the defendants and each of them are preliminary enjoined from reducing the water level on Lake Francis Case below its current level until either further Order of the court or close of business on May 25, 2002, whichever first occurs.

(3) No bond is required pursuant to Fed.R.Civ.P. 65(c).

Dated this 13th day of May, 2002.

BY THE COURT:

/s/ Charles B. Kornmann
CHARLES B. KORNMANN
United States District Judge

ATTEST:
JOSEPH HAAS, CLERK

BY: /s/ Jill Bowers
DEPUTY
(SEAL)

UNITED STATES DISTRICT COURT

DISTRICT OF NORTH DAKOTA

SOUTHWESTERN DIVISION

STATE OF NORTH DAKOTA, and JOHN HOEVEN, GOVERNOR, Plaintiffs, v. LT. COLONEL KURT F. UBBELOHDE, DISTRICT ENGINEER, OMAHA DISTRICT, UNITED STATES ARMY CORPS OF ENGINEERS, and GENERAL DAVID A. FASTABEND, COMMANDER, NW DIVISION, PORTLAND, OREGON, Defendants.	Civ. No. A1-02-059 (Filed May 12, 2002)

Plaintiffs filed an application for a temporary restraining order and motion for preliminary injunction. The Court has reviewed the Application, the Complaint, and the Supporting Brief, and HEREBY ORDERS:

That the defendants, and each of them, are temporarily restrained from reducing the water level of Lake Sakakawea below 1,827.6 msl, for a period of 10 days after the date of entry of this order (unless extended by order of the court) or, until further order of this court, whichever comes first.

Dated this 12 of May, 2002.

By the Court:

/s/ Patrick A. Conmy
Patrick A. Conmy
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

STATE OF NORTH DAKOTA and JOHN HOEVEN, GOVERNOR, Plaintiffs, v. LT. COLONEL KURT F. UBBELOHDE, DISTRICT ENGINEER, OMAHA DISTRICT, UNITED STATES ARMY CORPS OF ENGINEERS, and GENERAL DAVID A. FASTABEND, COMMANDER, NW DIVISION, PORTLAND, OREGON, Defendants.	Civ. No. A1-02-059 STIPULATION

1. On May 12, 2002, the Court entered a Temporary Restraining Order restraining Defendants "from reducing the water level of Lake Sakakawea below 1,827.6 msi, for a period of 10 days . . . (unless extended by order of the court) or, until further order of this court, whichever comes first."

2. The Defendants have filed a Notice of Appeal with the Eighth Circuit seeking review of the Court's May 12, 2002. Temporary Restraining Order. They have also appealed preliminary injunction orders issued by District Courts in South Dakota and Nebraska. The Defendants

have also filed with the Court of Appeals an "Emergency Motion for Stay Pending Appeal or in the Alternative, for Expedited Briefing of Appeals." The motion seeks to stay all the orders, including this Court's Temporary Restraining Order.

3. The Court has scheduled a hearing for May 20, 2002, on Plaintiffs' request for a preliminary injunction.

4. The parties have been discussing an interim settlement of their dispute and agree as follows:

a. That a preliminary injunction may be granted effective through May 25, 2002.

b. There is no longer a need for the scheduled hearing on May 20, 2002, and this stipulation can be considered a joint request to the Court that the hearing be cancelled.

c. That the Defendants, Until May 25, 2002 will prior to making releases from Lake Sakakawea to satisfy ESA listed birds, consider all of its other alternatives to protecting listed birds.

D. All Parties reserve all of their rights on appeal of the Order of May 12, 2002 to the United States Court of Appeals for the Eighth Circuit.

Dated this 17th day of May, 2002.

State of North Dakota
Wayne Stenehjern
Attorney General

/s/ Wayne Stenehjern
Wayne Stenehjern
Attorney General
State Bar ID No. 03442
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THOMAS L. SANSONETTI
Assistant Attorney General

UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

State of North Dakota, and
John Hoeven, Governor,

Plaintiffs,

-v- A1-02-059

Colonel Kurt F. Ubbelohde,
District Engineer, et al

Defendants.

MEMORANDUM AND ORDER

Without regard to the legal issues presented, it appears that the Federal Courts have no place in the management of the Missouri/Mississippi river system.

South Dakota sued to stop the reduction of the water levels in lake Oahe after the Corps apparently agreed with a request to provide a greater river flow through the State of Nebraska so that 4 barges could be moved.

District Judge Kornmann ordered that Oahe be maintained at a specified level, so that Corp began draining another South Dakota lake deemed vital by South Dakota game and fish officials in the sport fishing food chain. Judge Kornmann amended his order to prevent further depletion of this lake. Nebraska moved to intervene in the South Dakota case, which intervention was denied by Judge Kornmann.

The Corps responded by announcing that it would not reduce the releases from Lake Oahe, but would solve the problem by beginning to drain the already badly depleted

lake Sakakawea, thus compensating for the continued high level of releases from lake Oahe.

North Dakota entered the fray, and I signed a temporary restraining order requiring that the lake level in North Dakota be maintained at a level deemed necessary to protect the spawn and hatch of smelt, a vital food source for the game fish in the lake, but limited to the relatively brief period of time deemed necessary.

The Corps responded in typical fashion, announcing that it would drain Montana's drought stricken reservoirs, which, not surprisingly, resulted in the State of Montana obtaining a court order prohibiting such action.

Not to be outdone, Nebraska obtained an order requiring the Corps to keep a sufficient water flow for the four barges whose presence threatened the destruction of the sports fishing industry in the Dakotas, an industry which dwarfs the barge presence in economic impact.

The only things missing from the scenario are the absence of Court orders from Missouri and Illinois ordering the Corps to stop all flows which would worsen the flood stage levels of the river system at St. Louis.

I have not attempted an accurate count, but if we run the system all the way past New Orleans, we could have involved many Federal Court Districts and multiple Appellate Court Circuits. As is apparent, the interest of the various States are sharply divergent, and the Corps seems to have mastered the art of playing one against the other so as to maintain unfettered autonomy. Unfortunately, from the perhaps parochial viewpoint of the various states, it appears that at times the bureaucratic idiocy displayed borders on terrorism.

The solution to these continuing problems has to be political rather than judicial. Judge Kornmann may indeed be correct in his analysis that the District Courts do have both the jurisdiction and authority to entertain and grant applications for temporary injunctions, but I question the wisdom of the exercise of that authority, if in fact possessed. The crisis has been resolved through the cooperative efforts of the respective Governors and the Corps. This is as it should be. The parties have filed a stipulation to the effect that the temporary restraining order previously issued shall be replaced by a temporary injunction requiring the maintaining of the lake level through the 25th of May, 2002, subject to the following condition "that the defendants, until May 25, 2002 will, prior to making releases from Lake Sakakawea to satisfy ESA listed birds, consider all of its other alternatives to protecting listed birds."

Pursuant to the stipulation of the parties, the Court orders that the TRO be replaced at its scheduled expiration with a temporary injunction as provided in the stipulation of the parties filed herein.

Dated this 20th day of May, 2002.

/s/ Patrick A. Conmy
Patrick A. Conmy
Judge of the District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

STATE OF MONTANA, and JUDY MARTZ, GOVERNOR, Plaintiffs, v. LT. COLONEL KURT F. UBBELOHDE, DISTRICT ENGINEER, OMAHA DISTRICT, UNITED STATES ARMY CORPS OF ENGINEERS, and GENERAL DAVID A. FASTABEND, COMMANDER, NW DIVISION, PORTLAND, OREGON, Defendants.	CIV. CV-02-70-B16-RFC TEMPORARY RESTRAINING ORDER (Filed May 13, 2002)

The State of Montana and its Governor, Judy Martz (collectively "the State"), instituted the above-entitled action pursuant to Fed.R.Civ.P. 65 against the United States Army Corps of Engineers ("The Corps"), and seek a temporary restraining order to not increase releases from Ft. Peck Reservoir to make up for water that cannot be released from two South Dakota reservoirs pursuant to a preliminary injunction granted on May 10, 2002, by the United States District Court for the District of South Dakota, Central Division, *State of South Dakota, et al. v. Lt. Colonel Kurt F. Ubbelohde, et al.*, (Civ. No. 02-3011) (Complaint filed April 30, 2002), and to make up for water that cannot be released from Lake Sakakawea pursuant to a temporary restraining order granted on May 12, 2002,

by the United States District Court for the District of North Dakota, Southwestern Division, *State of North Dakota, et al. v. Lt. Colonel Kurt F. Ubbelohde, et al.*, (Civ. No. A1-02-059) (Filed May 12, 2002).

On May 10, 2002, as a result of the restraining order issued in South Dakota, the Corps announced that releases from Ft. Peck Dam in Montana would increase from the current 4,000 cubic feet per second to 6,000 cubic feet per second on May 11, 2002, and to 9,000 cubic feet per second on May 11, 2002. The level at Ft. Peck Lake will fall 6 inches to 2218 feet above mean sea level by May 25, 2002. On May 13, 2002, as a result of the temporary restraining order issued in North Dakota, additional releases have been ordered from Ft. Peck Reservoir. Montana has filed affidavits showing that due to drought conditions prevailing in the State over the past three years and the unanticipated increase in releases from Ft. Peck announced by the Corps that Montana will suffer irreparable injury to the fishery at Ft. Peck and a resultant adverse impact to the local economy.

Notice is not required to be given because of the exigent circumstances created by the States of South Dakota and North Dakota acquiring restraining orders on Friday and Sunday, thereby leaving only the waters of Ft. Peck Reservoir available to maintain the levels at the two lower states' reservoirs unless the water is taken from navigation.

GOOD CAUSE having been shown,

IT IS ORDERED that the above Defendants are hereby restrained from increasing releases from Ft. Peck Reservoir beyond the planned releases in the Corps' "Three Week Main Stem Regulation Forecast" dated May

7, 2002, for a period of 10 days after the date of entry of this order, unless extended by order of the Court) or, until further order of this Court, whichever comes first.

DATED this 13th day of May 2002 at 4:35 o'clock, p.m.

/s/ Richard F. Cebull
District Judge Richard F. Cebull
United States District Judge

[SEAL]

UNITED STATES OF AMERICA }
DISTRICT OF MONTANA } SS.

I, PATRICK E. DUFFY, Clerk of the United States District Court for the District of Montana, hereby certify that the above and foregoing is a true copy of the original hour on file in my office.

Dated this 13 day of May, 2002
PATRICK E. DUFFY Clerk

By /s/ Christine Rost
Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

STATE OF NEBRASKA ex rel. DON STENBERG, ATTORNEY GENERAL FOR THE STATE OF NEBRASKA, **Plaintiff,** **vs.** **LT. COLONEL KURT F. UBBELOHDE, DISTRICT ENGINEER, OMAHA DISTRICT, UNITED STATES ARMY CORPS OF ENGINEERS, and GENERAL DAVID FASTABEND, COMMANDER, NW DIVISION, PORTLAND, OREGON,** **Defendants.**	**CASE NO. 8:02CV217** **MEMORANDUM AND ORDER ON MOTION FOR PRELIMINARY INJUNCTION** (Filed May 13, 2002)

This matter is before the Court upon the Application for a Temporary Restraining Order sought by the Plaintiff, the State of Nebraska (Filing No. ___). The State of Nebraska is seeking injunctive relief against the United States army Corps of Engineers, Lt. Colonel Kurt F. Ubbelohde of the Corps' Omaha District and General David Fastabend of the Corps' Northwest Division (hereafter the "Corps" or "Corps of Engineers"). The Corps of Engineers received advance notice of the hearing on the application, which was conducted on May 13, 2002. All parties were represented by counsel, and each had an opportunity to submit evidence and make oral argument

to the Court. Exhibits A through H were received and have been considered. The requirements of Fed. R. Civ. P. 65 have been satisfied. The parties agreed that the matter would be submitted as an Application for a Preliminary Injunction.

Congress authorized the construction and operation of the Missouri River Mainstem System of Reservoirs for flood control, hydropower, irrigation, recreation, navigation, water supply and water quality, and fish and wildlife, primarily pursuant to the 1944 Flood Control Act. A drought that has adversely affected many States in the central United States, and the Corps of Engineer's response to the drought, are at the center of this dispute. The State of Nebraska contends that if the Corps of Engineers fails to release water from the Missouri River Mainstem reservoirs as required by the Corps' 1979 Master Manual and the Corps' current Annual Operating Plan, then flows on the Missouri River will fall to 13,000 cubic feet per second. If the flow falls to that level, Nebraska contends that it will suffer irreparable harm. The Corps of Engineers opposes the motion to the extent that the State of Nebraska is seeking to limit the Corps' discretion in handling this situation.

In determining whether preliminary injunctive relief should issue, this Court must consider the factors set forth in *Dataphase Systems, Inc. v. CL, Sys., Inc.,* 640 F.2d 109, 114 (8th Cir. 1981) (en banc). The Eighth Circuit Court has summarized those factors as follows:

> When considering a motion for a preliminary injunction, a district court weighs the movant's probability of success on the merits, the threat of

> irreparable harm to the movant absent the injunction, the balance between the harm and the injury that the injunction's issuance would inflict on other interested parties, and the public interest. *Dataphase System, Inc. v. CL, Sys., Inc.*, 640 F.2d 109, 114 (8th Cir. 1981) (en banc). We reverse the issuance of a preliminary injunction only if the issuance "is the product of an abuse of discretion or misplaced reliance on an erroneous legal premise." *City of Timber Lake v. Cheyenne River Sioux Tribe,* 10 F.3d 554, 556 (8th Cir. 1993) *cert. denied* 512 U.S. 1236, 114 S. Ct. 2741, 129 L.Ed.2d 861 (1994).

Pottgen v. Missouri State High Sch. Activities Ass'n., 40 F.3d 926, 929 (8th Cir. 1994). The burden of establishing the propriety of a preliminary injunction is on the movant. *Baker Elec. Co-op, Inc. v. Chaske*, 28 F.3d 1466, 1472 (8th Cir. 1994); *Modem Computer Sys., Inc., v. Modem Banking Sys., Inc.*, 871 F.2d 734, 737 (8th Cir. 1989) (en banc). "No single [Dataphase] factor in itself is dispositive; in each case all of the factors must be considered to determine whether on balance they weigh towards granting the injunction." *Baker Elec. Co-op,* 28 F.3d at 1472 (quoting *Calvin Klein Cosmetic Corp., v. Lenox Labs, Inc.*, 815 F.2d 500, 503 (8th Cir. 1987), and also citing *Dataphase.*

The parties disagree on whether Nebraska is likely to succeed on the merits of this case. The parties do acknowledge that the Corps is in immediate jeopardy of being forced to deviate from its 1979 Master Manual and current Annual Operating Plan. Nebraska makes a worthy case that under federal law, the Corps is required to abide by the 1979 Master Manual and its current Annual Operating Plan, and that if the Corps refuses or is restrained

from abiding by these plans, then the State of Nebraska will suffer irreparable harm.

Nebraska contends that if the Corps allows the Missouri River flow to fall to 13,000 cubic feet per second, Nebraska will suffer irreparable harm. For example, Nebraska has stated that prolonged reduced flows at that level will cause four major power plants in Nebraska to curtail or cease operations in order to comply with the plants' thermal discharge permits. In addition, Nebraska contends that a reduction in the flow will create a significant safety hazard by stranding barges traveling on the Missouri River, which may in turn cause barges to crack and discharge potentially dangerous or toxic substances into the river. Nebraska fisheries will suffer irreparable injury due to reduced flows because May and June are critical spawning months and reduced flows will prevent normal spawning. Wildlife will also be irreparably harmed. A threatened bird species, the piping plover, is likely to begin nesting next week along the Missouri River, and if the river's flow is significantly decreased, the birds may nest on sand bars in the river that are usually covered with water. Once the birds have nested, the Corps will need to take extraordinary measures to remove the birds if the water level rises. Alternatively, the Corps may be prevented from increasing the flow of the river until the chicks have sufficiently matured. In addition to the piping plover, a federally-listed endangered species, the least tern, will begin nesting in the area in early June and may be threatened by a dramatic increase or decrease in the river flow. The Corps of Engineers concedes that Nebraska is under a threat of irreparable harm to the navigability of the river along its border if the State of Montana succeeds in obtaining an injunction prohibiting the Corps from

releasing water from Fort Peck Lake, one of the main reservoirs on the system.

In considering the balance between the harm and the injury that the injunction's issuance would inflict on other interested parties to the action, the Court is mindful of the impact on the discretion of the Corps of Engineers and on other States and water users. While the Corps of Engineers may be hampered in the administration of its responsibilities were an injunction to issue, the Corps itself would not be harmed. On the other hand, absent injunctive relief, Nebraska has made a compelling showing that it will be [sic] surely be harmed.

The interest of Nebraska and its citizens has been comprehensively presented to this Court. There are, however, other States that will be affected if the Court decides to grant the injunctive relief Nebraska seeks. For example, the States of Missouri, Iowa and Kansas also have interests that will be affected by the issuance of a preliminary injunction. In this instance, the court believes that the interests of the States at the downstream end of the Missouri River Basin will be served, not hindered, by the Court's action in this case. While upstream States and water users may not benefit from the issuance of the preliminary injunction, they will have the continued benefit of the equitable allocation of water resources mandated by the 1979 Master Manual and Annual Operating Plan.

In deciding this issue, the Court acknowledges that, when there is a drought in the central United States, those States that rely on water from the Missouri River Basin are harmed. Compliance with a systematic plan, developed with the competing and legitimate interests of

all the water users in mind, is the best way to avoid or minimize irreparable harm during such periods of drought. Through the Flood Control Act of 1944, Congress authorized the Corps of Engineers to develop a systemic plan to address the extremes of drought and flood wrought by nature. This court is reluctant to interfere with the discretion of the Corps, but must recognize that court orders in other jurisdictions designed to safeguard interests of upstream water users are quickly stripping the Corps of Engineers of its ability to function as an objective steward of the water flows in the Missouri River Basin. Undoubtedly, the interests of the parties competing for access to limited water supplies, and the preservation of the Corps' independence to manage the water flows, will be resolved in an appellate court where all interested parties from all affected jurisdictions may be represented and heard. At this time, this Court must recognize that the Plaintiff will suffer irreparable harm if the Corps fails to release water from the Missouri River Mainstem reservoirs as required by the 1979 Master Manual and current Annual Operating Plan.

The Court concludes that the four *Dataphase* factors favor issuance of injunctive relief. Accordingly,

IT IS ORDERED:

1. Plaintiff's Application for a Temporary Restraining Order (Filing No.___) is denied in part and granted in part.

2. Defendants shall operate the Mainstem Reservoirs in accordance with the 1979 Master Manual and current Annual Operating Plan; and

3. Defendants shall operate the Mainstem Reservoirs so as to maintain the minimum navigation flows below

Gavins Point Dam as identified in the 1979 Master Manual and current Annual Operating Plan.

Dated this 13th day of May, 2002.

BY THE COURT:
/s/ Laurie Smith Camp
Laurie Smith Camp
United States
District Judge

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 02-2133/2144/2185/2187/2191/2305

State of South Dakota, et al.,	*	
Appellees,	*	Order Denying Petition for Rehearing and for Rehearing En Banc
v.	*	
Mo-Ark Association, et al.,	*	
Appellants.	*	

The petitions for rehearing en banc are denied. The petitions for rehearing by the panel are also denied.

Judge Bye would grant the petition for rehearing en banc.

(5128-010199)

September 30, 2003

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit

58 STAT.] 78TH CONG., 2D SESS. –
CHS. 662-665 – DEC. 22, 1944

* * *

[CHAPTER 665]

AN ACT

Authorizing the construction of certain public works on rivers and harbors for flood control, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, In connection with the exercise of jurisdiction over the rivers of the Nation through the construction of works of improvement, for navigation or flood control, as herein authorized, it is hereby declared to be the policy of the Congress to recognize the interests and rights of the States in determining the development of the watersheds within their borders and likewise their interests and rights in water utilization and control, as herein authorized to preserve and protect to the fullest possible extent established and potential uses, for all purposes, of the waters of the Nation's rivers; to facilitate the consideration of projects on a basis of comprehensive and coordinated development; and to limit the authorization and construction of navigation works to those in which a substantial benefit to navigation will be realized therefrom and which can be operated consistently with appropriate and economic use of the waters of such rivers by other users.

In conformity with this policy:

(a) Plans, proposals, or reports of the Chief of Engineers, War Department, for any works of improvement for navigation or flood control not heretofore or herein authorized,

shall be submitted to the Congress only upon compliance with the provisions of this paragraph (a). Investigations which form the basis of any such plans, proposals, or reports shall be conducted in such a manner as to give to the affected State or States, during the course of the investigations, information developed by the investigations and also opportunity for consultation regarding plans and proposals, and, to the extent deemed practicable by the Chief of Engineers, opportunity to cooperate in the investigations. If such investigations in whole or part are concerned with the use or control of waters rising west of the ninety-seventh meridian, the Chief of Engineers shall give to the Secretary of the Interior, during the course of the investigations, information developed by the investigations and also opportunity for consultation regarding plans and proposals, and to the extent deemed practicable by the Chief of Engineers, opportunity to cooperate in the investigations. The relations of the Chief of Engineers with any State under this paragraph (a) shall be with the Governor of the State or such official or agency of the State as the Governor may designate. The term "affected State or States" shall include those in which the works or any part thereof are proposed to be located; those which in whole or part are both within the drainage basin involved and situated in a State lying wholly or in part west of the ninety-eighth meridian; and such of those which are east of the ninety-eighth meridian as, in the judgment of the Chief of Engineers, will be substantially affected. Such plans, proposals, or reports and related investigations shall be made to the end, among other things, of facilitating the coordination of plans for the construction and operation of the proposed works with other plans involving the waters which would be used or controlled by such proposed works. Each report submitting any such plans or

proposals to the Congress shall set out therein, among other things, the relationship between the plans for construction and operation of the proposed works and the plans, if any, submitted by the affected States and by the Secretary of the Interior. The Chief of Engineers shall transmit a copy of his proposed report to each affected State, and, in case the plans or proposals covered by the report are concerned with the use or control of waters which rise in whole or in part west of the ninety-seventh meridian, to the Secretary of the Interior. Within ninety days from the date of receipt of said proposed report, the written views and recommendations of each affected State and of the Secretary of War shall transmit to the Congress, with such comments and recommendations as he deems appropriate, the proposed report together with the submitted views and recommendations of affected States and of the Secretary of the Interior. The Secretary of War may prepare and make said transmittal any time following said ninety-day period. The letter of transmittal and its attachments shall be printed as a House or Senate document.

(b) The use for navigation, in connection with the operation and maintenance of such works herein authorized for construction, of waters arising in States lying wholly or partly west of the ninety-eighth meridian shall be only such use as does not conflict with any beneficial consumptive use, present or future, in States lying wholly or partly west of the ninety-eighth meridian, of such waters for domestic, municipal, stock water, irrigation, mining, or industrial purposes.

(c) The Secretary of the Interior, in making investigations of and reports on works for irrigation and purposes incidental thereto shall, in relation to an affected State or States (as defined in paragraph (a) of this section), and to

the Secretary of War, be subject to the same provisions regarding investigations, plans, proposals, and reports as prescribed in paragraph (a) of this section for the Chief of Engineers and the Secretary of War. In the event a submission of views and recommendations, made by an affected State or by the Secretary of War pursuant to said provisions, sets forth objections to the plans or proposals covered by the report of the Secretary of the Interior, the proposed works shall not be deemed authorized except upon approval by an Act of Congress; and subsection 9(a) of the Reclamation Project Act of 1939 (53 Stat. 1187) and subsection 3(a) of the Act of August 11, 1939 (53 Stat. 1418), as amended, are hereby amended accordingly.

SEC. 2. That the words "flood control" as used in section 1 of the Act of June 2, 1936, shall be construed to include channel and major drainage improvements, and that hereafter Federal investigations and improvements of rivers and other waterways for flood control and allied purposes shall be under the jurisdiction of and shall be prosecuted by the War Department under the direction of the Secretary of War and supervision of the Chief of Engineers, and Federal investigations of watersheds and measures for run-off and water-flow retardation and soil-erosion prevention on watersheds shall be under the jurisdiction of and shall be prosecuted by the Department of Agriculture under the direction of the Secretary of Agriculture, except as otherwise provided by Act of Congress.

SEC. 3. That section 3 of the Act approved June 22, 1936 (Public, Numbered 738, Seventh-fourth Congress), as amended by section 2 of the Act approved June 28, 1938 (Public, Numbered 761, Seventy-fifth Congress), shall apply to all works authorized in this Act, except that for

any channel improvement or channel rectification project provisions (a), (b), and (c) of section 3 of said Act of June 22, 1936, shall apply thereto, and except as otherwise provided by law: *Provided*, That the authorization for any flood-control project herein adopted requiring local cooperation shall expire five years from the date on which local interests are notified in writing by the War Department of the requirements of local cooperation, unless said interests shall within said time furnish assurances satisfactory to the Secretary of War that the required cooperation will be furnished.

SEC. 4. The Chief of Engineers, under the supervision of the Secretary of War, is authorized to construct, maintain, and operate public park and recreational facilities in reservoir areas under the control of the War Department, and to permit the construction, maintenance, and operation of such facilities. The Secretary of War is authorized to grant leases of lands, including structure or facilities thereon, in reservoir areas for such periods and upon such terms as he may deem reasonable: *Provided*, That preference shall be given to Federal, State, or local governmental agencies, and licenses may be granted without monetary consideration, to such agencies for the use of areas suitable for public park and recreational purposes, when the Secretary of War determines such action to be in the public interest. The water areas of all such reservoirs shall be open to public use generally, without charge, for boating, swimming, bathing, fishing, and other recreational purposes, and ready access to and exit from such water areas along the shores of such reservoirs shall be maintained for general public use, when such use is determined by the Secretary of War not to be contrary to the public interest, all under such rules and

regulations as the Secretary of War may deem necessary. No use of any area to which this section applies shall be permitted which is inconsistent with the laws for the protection of fish and game of the State in which such area is situated. All moneys received for leases or privileges shall be deposited in the Treasury of the United States as miscellaneous receipts.

SEC. 5. Electric power and energy generated at reservoir projects under the control of the War Department and in the opinion of the Secretary of War not required in the operation of such projects shall be delivered to the Secretary of the Interior, who shall transmit and dispose of such power and energy in such manner as to encourage the most widespread use thereof at the lowest possible rates to consumers consistent with sound business principles, the rate schedules to become effective upon confirmation and approval by the Federal Power Commission. Rate schedules shall be drawn having regard to the recovery (upon the basis of the application of such rate schedules to the capacity of the electric facilities of the projects) of the cost of producing and transmitting such electric energy, including the amortization of the capital investment allocated to power over a reasonable period of years. Preference in the sale of such power and energy shall be given to public bodies and cooperatives. The Secretary of the Interior is authorized, from funds to be appropriated by the Congress, to construct or acquire, by purchase or other agreement, only such transmission lines and related facilities as may be necessary in order to make the power and energy generated at said projects available in wholesale quantities for sale on fair and reasonable terms and conditions to facilities owned by the Federal Government, public bodies, cooperatives, and

privately owned companies. All moneys received from such sales shall be deposited in the Treasury of the United States as miscellaneous receipts.

SEC. 6. That the Secretary of War is authorized to make contracts with States, municipalities, private concerns, or individuals, at such prices and on such terms as he may deem reasonable, for domestic and industrial uses for surplus water that may be available at any reservoir under the control of the War Department: *Provided*, That no contracts for such water shall adversely affect then existing lawful uses of such water. All moneys received from such contracts shall be deposited in the Treasury of the United States as miscellaneous receipts.

SEC. 7. Hereafter, it shall be the duty of the Secretary of War to prescribe regulations for the use of storage allocated for flood control or navigation at all reservoirs constructed wholly or in part with Federal funds provided on the basis of such purposes, and the operation of any such project shall be in accordance with such regulations: *Provided*, That this section shall not apply to the Tennessee Valley Authority, except that in case of danger from floods on the Lower Ohio and Mississippi Rivers the Tennessee Valley Authority is directed to regulate the release of water from the Tennessee River into the Ohio River in accordance with such instructions as may be issued by the War Department.

SEC. 8. Hereafter, whenever the Secretary of War determines, upon recommendation by the Secretary of the Interior that any dam and reservoir project operated under the direction of the Secretary of War may be utilized for irrigation purposes, the Secretary of the Interior is authorized to construct, operate, and maintain, under the

provisions of the Federal reclamation laws (Act of June 17, 1902, 32 Stat. 388, and acts amendatory thereof or supplementary thereto), such additional works in connection therewith as he may deem necessary for irrigation purposes. Such irrigation works may be undertaken only after a report and findings thereon have been made by the Secretary of the Interior as provided in said Federal reclamation laws and after subsequent specific authorization of the Congress by an authorization Act; and, within the limits of the water users' repayment ability such report may be predicated on the allocation to irrigation of an appropriate portion of the cost of structures and facilities used for irrigation and other purposes. Dams and reservoirs operated under the direction of the Secretary of War may be utilized hereafter for irrigation purposes only in conformity with the provisions of this section, but the foregoing requirement shall not prejudice lawful uses now exisiting [sic]: *Provided*, That this section shall not apply to any dam or reservoir heretofore constructed in whole or in part by the army engineers, which provides conservation storage of water for irrigation purposes.

SEC. 9. (a) The general comprehensive plans set forth in House Document 475 and Senate Document 191, Seventy-eighth Congress, second session, as revised and coordinated by Senate Document 247, Seventy-eighth Congress, second session, are hereby approved and the initial stages recommended are hereby authorized and shall be prosecuted by the War Department and the Department of the Interior as speedily as may be consistent with budgetary requirements.

(b) The general comprehensive plan for flood control and other purposes in the Missouri River Basin approved by the Act of June 28, 1938, as modified by subsequent

Acts, is hereby expanded to include the works referred to in paragraph (a) to be undertaken by the War Department; and said expanded plan shall be prosecuted under the direction of the Secretary of War and supervision of the Chief of Engineers.

(c) Subject to the basin-wide findings and recommendations regarding the benefits, the allocations of costs and the repayments by water users, made in said House and Senate documents, the reclamation and power developments to be undertaken by the Secretary of Interior under said plans shall be governed by the Federal Reclamation Laws (Act of June 17, 1902, 32 Stat. 388, and Acts amendatory thereof or supplementary thereto), except that irrigation of Indian trust and tribal lands, and repayment therefor, shall be in accordance with the laws relating to Indian lands.

(d) In addition to previous authorizations there is hereby authorized to be appropriated the sum of $200,000,000 for the partial accomplishment of the works to be undertaken under said expanded plans by the Corps of Engineers.

(e) The sum of $200,000,000 is hereby authorized to be appropriated for the partial accomplishment of the works to be undertaken under said plans by the Secretary of the Interior.

SEC. 10. That the following works of improvement for the benefit of navigation and the control of destructive flood waters and other purposes are hereby adopted and authorized in the interest of the national security and with a view toward providing an adequate reservoir of useful and worthy public works for the post-war construction program, to be prosecuted under the direction of the

Secretary of War and supervision of the Chief of Engineers in accordance with the plans in the respective reports hereinafter designated and subject to the conditions set forth therein: *Provided*, That the necessary plans, specifications, and preliminary work may be prosecuted on any project authorized in this Act to be constructed by the War Department during the war, with funds from appropriations heretofore or hereafter made for flood control, so as to be ready for rapid inauguration of a post-war program of construction: *Provided further*, That when the existing critical situation with respect to materials, equipment, and manpower no longer exists, and in any event not later than immediately following the cessation of hostilities in the present war, the projects herein shall be initiated as expeditiously and prosecuted as vigorously as may be consistent with budgetary requirements: *And provided further*, That penstocks and other similar facilities adapted to possible future use in the development of hydroelectric power shall be installed in any dam authorized in this Act for construction by the War Department when approved by the Secretary of War on the recommendation of the Chief of Engineers and the Federal Power Commission.

* * *

Exhibit No. 6

78TH CONGRESS, *2d Session* } SENATE { DOCUMENT No. 247

MISSOURI RIVER BASIN

REPORT

OF A

COMMITTEE OF TWO REPRESENTATIVES EACH FROM THE CORPS OF ENGINEERS, U. S. ARMY, AND BUREAU OF RECLAMATION, APPOINTED TO REVIEW THE FEATURES OF THE PLANS PRESENTED BY THE CORPS OF ENGINEERS (HOUSE DOCUMENT NO. 475) AND THE BUREAU OF RECLAMATION (SENATE DOCUMENT NO. 191) FOR THE COMPREHENSIVE DEVELOPMENT OF THE MISSOURI RIVER BASIN

Supplemental to Senate Document No. 191 and House Document No. 475, 78th Congress

(**LOGO**)

PRESENTED BY MR. O'MAHONEY

NOVEMBER 21, 1944. – Ordered to be printed

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1944

MISSOURI RIVER BASIN

OCTOBER 25, 1944.

To the SECRETARY OF WAR and the SECRETARY OF THE INTERIOR:

1. In view of the questions raised regarding the differences between the separate plans presented by the Corps of Engineers (H. Doc. 475, 78th Cong., 2d sess.) and the Bureau of Reclamation (S. Doc. 191, 78th Cong., 2d sess.) for the comprehensive development of the Missouri River Basin, a committee, composed of two representatives each from the Corps of Engineers and the Bureau of Reclamation, was appointed to review the engineering features of the two plans with a view of reconciliation between them.

2. The committee met at Omaha, Nebr., on October 16 and 17, 1944, discussed the various features of both plans, examined the supporting data for each plan, and prepared the enclosed joint engineering report. The joint engineering report points out that by making appropriate modifications it is possible to eliminate existing differences between the two plans.

3. It was possible to bring into agreement the plans of the Corps of Engineers and the Bureau of Reclamation by recognizing the following basic principles:

(*a*) The Corps of Engineers should have the responsibility for determining main stem reservoir capacities and capacities of tributary reservoirs for flood control and navigation.

(*b*) The Bureau of Reclamation should have the responsibility for determining the reservoir capacities on the main stem and tributaries of the Missouri River for irrigation, the probable extent of future irrigation, and the amount of stream depletion due to irrigation development.

(*c*) Both agencies recognize the importance of the fullest development of the potential hydroelectric power in the basin consistent with the other beneficial uses of water.

4. For convenience in referring to the joint engineering report the following comparable six subdivisions contained in the report of the Bureau of Reclamation, Senate Document 191, Seventy-eighth Congress, second session, have been used:

(*a*) Upper Missouri River Basin.

(*b*) Yellowstone River Basin.

(*c*) Missouri River – Fort Peck to Sioux City.

(*d*) Minor western tributaries.

(*e*) Niobrara, Platte, and Kansas Rivers.

(*f*) Lower Missouri Basin.

UPPER MISSOURI RIVER BASIN

5. The plan presented in House Document 475, Seventy-eighth Congress, second session, does not specifically designate any units in the upper Missouri River Basin subdivision, although provisions are made for desirable and necessary projects in this area. The plan presented in Senate Document 191, Seventy-eighth Congress, second session, contemplates the construction of

19 reservoirs with a total storage capacity of 3,359,950 acre-feet for flood control, silt control, the development of hydroelectric power, the irrigation of 460,900 acres of new lands, and the provision of a supplemental water supply for 208,700 acres of land now being served with an inadequate water supply. There is no conflict in the proposed plans of the two agencies for the upper Missouri River Basin subdivision.

YELLOWSTONE RIVER BASIN

6. The plan presented in House Document 475, Seventy-eighth Congress, second session, provides for the construction of Boysen Reservoir with a storage capacity of 3,500,000 acre-feet and the Lower Canyon Reservoir with a capacity of 2,250,000 acre-feet to be operated for flood control, irrigation, navigation, power, and other purposes. The plan presented in Senate Document 191, Seventy-eighth Congress, second session, provides for the construction of 27 reservoirs located on various streams in the Yellowstone River subdivision with a total storage capacity of 4,285,200 acre-feet; the reservoirs to be operated for flood control, silt control, the development of hydroelectric power, the irrigation of 509,560 acres of new lands, and the provision of a supplemental water supply for 204,500 acres of land now being served with an inadequate water supply. It was concluded that the plan described in Senate Document 191, Seventy-eighth Congress, second session, would be adequate to accomplish the objectives of the plan described in House Document 475, Seventy-eighth Congress, second session.

MISSOURI RIVER – FORT PECK TO SIOUX CITY

7. The plan presented in House Document 475, Seventy-eighth Congress, second session, contemplates the construction of five additional multiple-purpose reservoirs on the main stem of the Missouri River for flood control, navigation, irrigation, power, domestic and sanitary purposes, wildlife, and recreation, as shown in the following table:

Project	Location	Approximate gross storage capacity (acre-feet)
Garrison	Near Garrison, N. Dak.	17,000,000
Oak Creek	Near Mobridge, S. Dak.	6,000,000
Oahe	Near Pierre, S. Dak.	6,000,000
Fort Randall	Near Wheeler, S. Dak.	6,000,000
Gavins Point	Near Yankton, S. Dak.	200,000

The plan also provides that as soon as substitute storage is built on the main stem of the river, the Fort Peck Reservoir will be operated as a multiple-purpose reservoir primarily in the interest of irrigation.

8. The plan presented in Senate Document 191, Seventy-eighth Congress, second session, contemplates the use of Fort Peck Reservoir primarily for irrigation purposes, also for navigation, flood control, silt control, and power, and the construction of main stem reservoirs to be operated for flood control, irrigation, navigation, power, silt control, and other purposes, as follows:

Project	Location	Approximate gross storage capacity (acre-feet)
Oahe	Near Pierre, S. Dak.	19,600,000
Fort Randall	Near Wheeler, S. Dak	5,100,000
Big Bend	Near Joe Creek, S. Dak	250,000

Senate Document 191, Seventy-eighth Congress, second session, also includes four inland reservoirs to assist in regulating the water diverted from the main stem and the irrigation of 2,292,900 acres of new lands in the Missouri River – Fort Peck to Sioux City subdivision.

9. After full discussion of the various features of the two plans in this subdivision the following main-stem reservoirs were recommended in the joint engineering report in order to more fully utilize the water resources of the basin and to most effectively serve the present and ultimate requirements of flood control, irrigation, navigation, hydroelectric power, and other uses.

Project	Location	Approximate gross storage capacity (acre-feet)
Garrison	Near Garrison, N. Dak	17,000,000
Oahe	Near Pierre, S. Dak	19,600,000
Fort Randall	Near Wheeler, S. Dak.	5,100,000
Big Bend	Near Joe Creek, S. Dak.	250,000
Gavins Point	Near Yankton, S. Dak.	200,000

The final storage capacities to be selected for the above reservoirs will be jointly agreed upon after more detailed plans and cost estimates have been made.

10. The Garrison Dam, Reservoir, and power plant was included in the coordinated plan as it provides a large volume of useful storage capacity for flood control, navigation, and irrigation, and permits the utilization of approximately 160 feet of head for the development of hydroelectric power in an area capable of absorbing the potential output and which, otherwise, has no prospective source of abundant low-cost power. A large reservoir at the Garrison site, situated immediately below the Yellowstone River with its large silt contribution, will prolong materially the life of downstream reservoirs.

11. The selection of the high Oahe Dam, Reservoir, and power plant as proposed in Senate Document 191, Seventy-eighth Congress, second session, floods out the Oak Creek Dam, Reservoir, and power plant as proposed in House Document 475, Seventy-eighth Congress, second session. The high Oahe Dam is required in connection with the irrigation of 750,000 acres of land in the James River Basin as well as to provide useful storage for flood control, navigation, the development of hydroelectric power, and other purposes. If the Oahe Reservoir is constructed to the elevation proposed in Senate Document 191, Seventy-eighth Congress, second session, a greater storage capacity will be provided than contemplated in the low Oahe and Oak Creek Reservoirs at considerably less cost.

12. The Fort Randall Dam in House Document 475, Seventy-eighth Congress, second session, and Senate Document 191, Seventy-eighth Congress, second session, utilizes the same site. However, House Document 475 contemplates a normal pool level at 1,375 mean sea level whereas Senate Document 191 contemplates a pool level at 1,365 mean sea level, in order to not interfere with the

Big Bend power plant located near the upper limits of the reservoir. The Big Bend project is considered highly desirable in the ultimate development inasmuch as approximately 60 feet of head is thereby made available for the development of hydroelectric power. The use of the Garrison, high Oahe, Big Bend, Fort Randall, and Gavins Point Dams and Reservoirs as outlined above and agreed upon in the joint engineering report will provide the desired degree of flood control, supply the needs of irrigation as well as furnish cyclic storage for navigation during prolonged drought periods. The plan also utilizes practically all of the available power head in the Missouri River between the mouth of the Yellowstone River and the Gavins Point Dam.

MINOR WESTERN TRIBUTARIES

13. The plan of development presented in House Document 475, Seventy-eighth Congress, second session, does not specifically designate any units in the minor western tributaries subdivision, although provisions are made for desirable and necessary projects in this area. The plan presented in Senate Document 191, Seventy-eighth Congress, second session, provides for the construction of 15 reservoirs with a total storage capacity of 1,237,000 acre-feet, the reservoirs to be operated for flood control, silt control, the development of hydroelectric power, the irrigation of 212,980 acres of new lands, and the provision of a supplemental water supply for 11,300 acres of land now being served with an inadequate water supply. There is no conflict in the proposed plans of the two agencies for the minor western tributaries subdivision.

NIOBRARA, PLATTE, AND KANSAS RIVERS

14. The plan of development presented in House Document 475, Seventy-eighth Congress, second session, contemplates the construction of 9 reservoirs (of which 4 have been previously authorized) for flood control, irrigation, and other purposes. The lands to be irrigated were not specified in the report and were to be determined by later detailed investigation. The plan presented in Senate Document 191, Seventy-eighth Congress, second session, contemplates the construction of 22 reservoirs on various streams in the Niobrara, Platte, and Kansas Rivers subdivision with a total storage capacity of 5,650,400 acre-feet; the reservoirs to be operated for flood control, silt control, the irrigation of 1,284,060 acres of new land, and the provision of a supplemental water supply to 21,804 acres of land now being served with an inadequate water supply. The following substitutions were found to be desirable in the Kansas River Basin:

(*a*) On the south fork of the Republican River, the Bonny Reservoir, in Senate Document 191, was substituted for the Hale Reservoir in House Document 475 to permit the irrigation of approximately 6,500 acres of additional lands. The two reservoir sites are located within 4 miles of each other and for all practicable purposes would provide a comparable degree of flood control.

(*b*) On the Arikeree River the Pioneer Reservoir, in Senate Document 191, was substituted for the Beecher Island Reservoir in House Document 475 inasmuch as the Pioneer Reservoir controlled a larger drainage area, therefore was more advantageous for flood control, and reconnaissance studies by the Bureau of Reclamation

indicated that there were no lands suitable for irrigation between the two sites.

(*c*) On Frenchman Creek the Enders Reservoir in House Document 475, was substituted for the Harvey Reservoir in Senate Document 191, because the Enders Reservoir could be built to a greater capacity than the Harvey Reservoir, and would furnish additional flood protection for the Frenchman Creek Valley in Nebraska. Both sites are suitably located to serve all potential irrigation developments.

LOWER MISSOURI BASIN

15. The plan of development as presented in House Document 475 and Senate Document 191 for this subdivision are identical, therefore no conflict in the engineering features of the two plans exist. The plans include seven reservoirs and a series of levees and appurtenant works along both sides of the Missouri River from the vicinity of Sioux City, Iowa, to the vicinity of the mouth of the Missouri River.

16. Development of the Missouri River Basin in accordance with House Document 475, Seventy-eighth Congress, second session, and Senate Document 191, Seventy-eighth Congress, second session, as coordinated in the enclosed joint engineering report, if authorized as a unified plan, will secure the maximum benefits for flood control, irrigation, navigation, power, domestic and sanitary purposes, wildlife, and recreation. Precise elevations and heights of reservoirs and dams, and final determinations of the power installations required, can be agreed upon after more detailed plans and cost estimates have been obtained and compared with benefits, and after

consideration has been given to the desires and objections of persons affected by the proposed developments.

HARRY W. BASHORE,
Commissioner,
Bureau of Reclamation,
Department of the Interior.

E. REYBOLD,
Major General,
Chief of Engineers, United States Army,
War Department.

WAR DEPARTMENT,
OFFICE OF THE DIVISION ENGINEER,
MISSOURI RIVER DIVISION,
Omaha, Nebr., October 17, 1944.

Subject: Joint report of representatives of Bureau of Reclamation and Corps of Engineers on plans for development of the Missouri River Basin.

To: The Chief of Engineers, United States Army, Washington, D. C., and the Commissioner, Bureau of Reclamation, Department of the Interior, Washington, D. C.

1. In accordance with instructions contained in letter of October 10, 1944, from the Commissioner of Reclamation to Mr. W. G. Sloan, assistant regional director, Bureau of Reclamation, Billings, Mont., and Mr. John Riter, acting director, Branch of Project Planning, Bureau of Reclamation, Denver, Colo., and letter of same date from the Chief of Engineers to the division engineer, Missouri River division, a conference was held in Omaha, Nebr., on October 16-17, 1944, as a result of which the following joint report is submitted.

2. For purposes of discussion, the basin was divided into the following six subdivisions contained in the report of the Bureau of Reclamation, Senate Document No. 191, Seventy-eighth Congress, second session:

(*a*) Upper Missouri River Basin.

(*b*) Yellowstone River Basin.

(*c*) Missouri River – Fort Peck to Sioux City.

(*d*) Minor western tributaries.

(*e*) Niobrara, Platte, and Kansas Rivers.

(*f*) Lower Missouri Basin.

3. It was agreed that there were no points of conflict in the engineering features of the two plans in the following subdivisions:

(*a*) Upper Missouri River Basin.

(*b*) Minor western tributaries.

(*c*) Lower Missouri Basin.

4. It was agreed that the Yellowstone River Basin be developed in accordance with the plans set forth in Senate Document No. 191, Seventh-eighth Congress, second session. With regard to the other two subdivisions all of the engineering features of both plans were agreed upon with the following modifications:

(*a*) Missouri River: Fort Peck to Sioux City.

(1) The Gavins Point Reservoir and the Garrison Reservoir to be developed in accordance with House Document No. 475 Seventy-eighth Congress, second session.

(2) The Fort Randall Reservoir, the Big Bend Reservoir, and the Oahe Reservoir to be developed in accordance with Senate Document No. 191, Seventy-eighth Congress, second session.

(3) The Oak Creek Reservoir, as proposed in House Document No. 475, Seventy-eighth Congress, second session, to be eliminated.

(*b*) Niobrara, Platte, and Kansas Rivers: It was agreed to substitute the Bonny and Pioneer Reservoirs, as proposed in Senate Document No. 191, Seventy-eighth Congress, second session, for the Hale and Beecher Island Reservoirs as proposed in House Document No. 475, Seventy-eighth Congress, second session, and to substitute the Enders Reservoir as proposed in House Document No. 475, Seventy-eighth Congress, second session, for the Harvey Reservoir as proposed in Senate Document No. 191, Seventy-eighth Congress, second session.

R. C. CRAWFORD,
Brigadier General, United States Army,
Division Engineer,

GAIL A. HATHAWAY,
Head Engineer,
Representing Office of the
Chief of Engineers.

W. G. SLOAN,
Assistant Regional Director,
Bureau of Reclamation,
Billings, Mont.

JOHN R. RITER,
Acting Director, Branch of Project Planning,
Bureau of Reclamation,
Denver, Colo.